Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

CYNTHIA F. NORDSTROM,

Petitioner,

v.

PETER J. NORDSTROM,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER FEDERAL LEGISLATION AND POLICY SUPERSEDES THE FIRST COURT OF APPEALS' CONSTRUCTIONS AND INTERPRETATIONS OF TEXAS' CHILD SUPPORT GUIDELINES, WHICH WERE SPECIFICALLY ENACTED BY THE TEXAS LEGISLATURE TO CONFORM WITH THE REQUIREMENTS OF THE FAMILY SUPPORT ACT OF 1988, TO WIT:

1. WHETHER A TRIAL COURT MAY FAIL TO FIND THE NEEDS OF THE CHILD;
2. WHETHER THE FIRST COURT OF APPEALS HAS PROPERLY INTERPRETED AND APPLIED TEXAS' VERSION OF THE FEDERAL DELAWARE MELSON FORMULA TO CALCULATE CHILD SUPPORT;
3. WHETHER THE TRIAL COURT MAY SPECIFICALLY EXCLUDE, OR FAIL TO FIND ALL OF THE INCOME OF THE ABSENT PARENT;
4. WHETHER THE ELIMINATION OF ADDITIONAL FACTORS AND OTHER CONSIDERATIONS FROM THE CHILD SUPPORT CALCULATION IS UNLAWFUL; AND
5. WHETHER THE 1995 REVISIONS TO THE TEXAS FAMILY CODE, WHICH WERE CHANGED IN RESPONSE TO A FEDERAL REGULATORY RULING, MADE RETROACTIVE CHILD SUPPORT MANDATORY, AND WHETHER THE FIRST COURT OF APPEALS' ADDITIONAL REQUIREMENT OF NEED HAS THE EFFECT OF DISQUALIFYING CUSTODIAL PARENTS FROM RECEIVING RETROACTIVE CHILD SUPPORT.

II. WHETHER ASSESSING THE ATTORNEY'S FEES OF THE ABSENT FATHER AGAINST THE CUSTODIAL MOTHER EVEN WHEN THE TRIAL COURT ORDERS AN INCREASE IN CHILD SUPPORT: (1) IS UNLAWFUL IN THAT IT EFFECTIVELY REDUCES CHILD SUPPORT: OR (2) HAS A CHILLING EFFECT ON CUSTODIAL

PARENTS IN TEXAS, EFFECTIVELY DENYING THEM ACCESS TO THE STATE COURTS, OR THE OPPORTUNITY TO RECEIVE AN AWARD OF CHILD SUPPORT BASED ON THE FEDERALLY MANDATED CHILD SUPPORT GUIDELINES.

LIST OF PARTIES

The Petitioner in this proceeding is Cynthia F. Nordstrom. The Respondent in this proceeding is Peter J. Nordstrom.

RULE 29.4(a) LISTING

Cynthia Nordstrom, a party to this Proceeding, is an employee of the Federal Energy Regulatory Commission. According to the requirements of Rule 29.4(a), the Solicotor General of the United States will be served with a copy of this Petition.

RULE 29.4(c) LISTING

The decision of the Texas State First Court of Appeals in this case has misinterpreted and misconstrued Texas child support statutes which were specifically enacted to conform with federal law and regulation. Since this decision by First Court of Appeals is now the law in Texas, the constitutionality of its interpretation and construction of the state statutes is the major issue in this case. Therefore, 28 U.S.C. §2403(b) may apply. According to the requirements of Rule 29.4(c), the Attorney General of the State of Texas will be served with a copy of this Petition.

Page

TABLE OF CONTENTS

Questions Presented i
List Of Parties iii
Rule 29.4(a) Listing iii
Rule 29.4(c) Listing iii
Table Of Contents iv
Reference To Appendix vii
Reference To Lodgings vii
Table Of Authorities ix
Opinions And Judgments Below 1
Statement Of Jurisdiction 2
Statutes Involved 2
Argument:
The Texas First Court Of Appeals Has Destroyed An Entire Scheme of Texas Child Support Statutes Which Were Specifically Enacted To Comply With Federal Law And Policy 3
A. The Success Of The Welfare Reform Act Depends On State Court Orders Assessing Child Support Based On Federally Mandated Child Support Guidelines 5
B. The States Changed Their Child Support Statutes To Conform Specifically With Federal Requirements 7
C. The First Court Of Appeals Has Affirmed Incorrect Constructions Of Four Of The

Page

Most Important Sections Of The Texas Family Code 10

D. Contrary To Federal And State Mandate, The First Court Of Appeals Has Excused The Trial Court From Finding The Needs Of The Child 14

E. The Court Of Appeals Has Destroyed The Proper Interpretation And Application Of Texas' Version Of The Delaware Melson Formula 17

F. The First Court Of Appeals Has Dodged The Federal And State Requirements To Find All Of The Income Sources Of The Absent Parent, And Allowed The Trial Court To Specifically Exclude Substantial Deferred Income 20

G. Contrary To Federal And State Mandate, The First Court Of Appeals Has Eliminated Additional Factors Which Are Intended To Be Included In The Child Support Calculation 22

H. The First Court Of Appeals Has Misinterpreted The 1995 Revisions To The Texas Family Code Which Make Retroactive Child Support Mandatory In Response To An OCSE Action Transmittal.....23

I. By Assessing The Attorneys' Fees Of The Absent Father, Who Had A Reported Income Of $238,980.39, Against The Custodial Mother, The Court Of Appeals Has

Page

Sent A Chilling Message To The Single Mothers Of Texas As To What They Can Expect From The Texas Family Courts. 26

Conclusion 28

REFERENCE TO APPENDIX

State Materials material herein are reproduced in the Appendix To Petition For Writ Of Certiorari, printed and filed concurrently and bound separately. Refer to the Appendix Table Of Contents for a complete listing of items.

REFERENCE TO LODGINGS

Federal Materials herein have been lodged concurrently with following specifications:

Lodging A – *Child Support Guidelines: The next generation,* M. Haynes, Published by the U.S. Department of Health and Human Services, Administration for Children and Families, Office of Child Support Enforcement, 1994.

Lodging B – Office of Child Support Enforcement Final Rule, Action Transmittal AT-91-02, issued May 16, 1990:

- This Final Rule by the Office of Child Support Enforcement implements five provisions of the Family Support Act of 1988, as amended, including the requirement that state guidelines be used as a rebuttable presumption of child support levels.
- In this Final Rule, the Office of Child support Enforcement requires the states to change their laws to conform with the amendments to the Family Support Act.

– *(continued)* –

Lodging C – Office of Child Support Enforcement, Action Transmittal, AT-9304, issued March 22, 1993:

– In this Action Transmittal, the Office of Child Support Enforcement mandates that retroactive child support must be based on the guidelines

Office of Child Support Enforcement, Action Transmittal AT-9308, issued June 26, 1993:

– In this Action Transmittal, the OCSE clarifies that reimbursement of public assistance through IV-D programs must be based on support obligations established using presumptive guidelines.

Lodging D – "Children Today – Special Issue on Child Enforcement," published by the U.S. Department of Health and Human Services in 1997. The first 17 pages of this magazine explains the basics of child support enforcement from a federal perspective, contains legislative highlights in this area, and describes the changes mandated by the Welfare Reform Act

TABLE OF AUTHORITIES

Page

Cases:

Belcher v. Belcher, 808 S.W.2d 202 (Tex. App. – El Paso, 1991, reh'g overruled) 14

In the Interest of B.I.V., 923 S.W.2d 573 (Tex. 1996) 13, 24

Brown v. Board of Education, 349 U.S. 294 (1955) 5

City of Burbank v. Lockheed Air Terminal, 411 U.S. ___ 5

Clark v. Jamison, 874 S.W.2d 312 (Tex. App. – Houston [14th Dist.], 1994, no writ) 14

Cooper v. Aaron, 358 U.S. 1 (1958) 5

Daniels v. Allen, 811 S.W.2d 278 (Tex. App. – Tyler, 1991, no writ) 9

Drexel v. McCutcheon, 604 S.W.2d 430 (Tex. Civ. App. – Waco 1980, no writ) 9

Ikard v. Ikard, 819 S.W.2d 644 (Tex. App. – El Paso, 1991, no writ) 14

Illinois v. City of Milwaukee, 406 U.S. 91 (1972) 5

Liner v. Jafco, 375 U.S. 301 (1964) 5

Marichal v. Marichal, 768 S.W.2d 383 (Tex. App. – Houston [14th Dist.] 1989, writ denied) 9

Nordstrom v. Nordstrom, 965 S.W.2d ___ (Tex. App. – Houston (1st Dist.] 1997, writ denied, pet. for reh'g ref. September 3, 1998) ..... *passim*

Cases, continued: Page

In Interest of Pecht, 874 S.W.2d 797 (Tex. App. – Texarkana, 1994, no writ). 14

Pennsylvania v. Nelson, 350 U.S. 497 (1956) 5

Puerto Rico v. Branstad, 483 U.S. 219 (1987) 5

Rice v. Santa Fe Elevator Corporation, 311 U.S. 218 (1947) 5

Rodriguez v. Rodriguez, 860 S.W.2d 414 (Tex. 1993) 19

Sohocki v. Sohocki, 730 S.W.2d 30 (Tex. App. – Corpus Christi, 1987, no writ). 14

Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173 (1942) 5

Thomas v. Thomas, 895 S.W.2d 896 (Tex. App. – Waco, 1995, no writ). 14

Washington v. Washington State Commercial Passenger Fishing Vessel Assn., 443 U.S. 658 (1979). 5

Other Authorities:

The Social Services Amendments of 1974. 6

The Child S ıpport Enforcement Amendments of 1984. 6

The Family Support Act of 1988 . . . . . *passim*

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (The Welfare Reform Act). . . . . *passim*

Other Authorities, continued Page

The Omnibus Reconciliation Act of 1993 6

The Child Support Performance and Incentive Act of 1998 7

The Deadbeat Parents Punishment Act of 1998 7

28 U.S.C. §1257 (1994) 2

42 U.S.C. §667 (1994) 2, 3

45 Code of Federal Regulations §302.56 (1997) 3, 5, 14

Child Support Guidelines: The next generation, M. Haynes, Published in April 1994, by the U.S. Department of Health and Human Services, Administration for Children and Families, Office of Child Support Enforcement . . . . *passim*

Office of Child Support Enforcement Action Transmittal, AT-91-02 4

Office of Child Support Enforcement Action Transmittal, AT-93-04 23

Tex. Fam. Code Section 14.053(l) (1993) 23

Tex. Fam. Code Section 14.062 (1993) 23

Tex. Fam. Code Section 106.002 (1995) 26

Tex. Fam. Code Section 154.062 (1995) 8, 20

Tex. Fam. Code Section 154.065 (1995) 8, 11

Tex. Fam. Code Section 154.066 (1995) 8

Tex. Fam. Code Section 154.067 (1995) 8

Tex. Fam. Code Section 154.068 (1995) 8

Other Authorities, continued: **Page**

Tex. Fam. Code Section 154.123 (1995) 10
Tex. Fam. Code Section 154.125 (1995) ... 1, 2, 19, 22
Tex. Fam. Code Section 154.126 (1995) ..... *passim*
Tex. Fam. Code Section 154.129 (1995) 8
Tex. Fam. Code Section 154.130 (1995) 11, 14
Tex. Fam. Code Section 154.131 (1995) 13, 14, 25
Tex. Fam. Code Section 156.401 (1995) 24

Petitioner, Cynthia F. Nordstrom, respectfully prays that a Writ of Certiorari issue to review the Opinion of the Texas First Court of Appeals, entered in this matter on November 6, 1997.

OPINIONS AND JUDGMENTS BELOW

The Opinion of the three judge panel of the Texas First Court of Appeals, entered November 6, 1998, is reported in the Southwest Reporter at 965 S.W.2d ___ (Tex. App. - Houston [1st Dist.], pet. ref. September 3, 1998). The Supreme Court of Texas denied the petition for review on July 16, 1998, and refused the petition for rehearing on September 3, 1998. Petitioner had appealed to the First Court of Appeals from a judgment in a Motion To Modify In A Suit Affecting Parent-Child Relationship under the 1995 revisions to the Texas Family Code. The presiding judge of the 245th District Court was the Honorable Annette Galik, held a trial *de novo* on March 15 and March 27, 1996. The Motion To Modify In A Suit Affecting Parent-Child Relationship was filed October 11, 1994. The first hearing was held before the Master, Bruce Kessler, on January 6, 1996. The Petitioner (Appellant in the First Court of Appeals) was and is referred to as the managing conservator, obligee or custodial parent. The Respondent (Appellee in the First Court of Appeals) was and is referred to as the possessory conservator, obligor, non-custodial or absent parent.

STATEMENT OF JURISDICTION

The Texas State First Court of Appeals has construed and interpreted the Texas Family Code Child Support Statutes, which were specifically enacted to conform with the Family Support Act of 1988, and implementing federal regulations and policies, in a manner so as to conflict and contravene federal intent. The jurisdiction of this court is invoked under 28 U.S.C. §1257(a).

STATUTES INVOLVED

This case involves 42 U.S.C. §667 (1994), and sixteen Texas Family Code statutes too numerous to recite. They can be found in Appendix sections C, D, E, F, G, H. I and J.

ARGUMENT

THE TEXAS FIRST COURT OF APPEALS HAS DESTROYED AN ENTIRE SCHEME OF TEXAS CHILD SUPPORT STATUTES WHICH WERE SPECIFICALLY ENACTED TO COMPLY WITH FEDERAL LAW AND POLICY.

Nordstrom v. Nordstrom is a child support modification case brought under the 1995 Revisions to the Texas Family Code. The Texas statutes concerning child support were enacted to conform with the specific requirements of the federal Family Support Act of 1988 (Public Law 100-485), as amended. This decision by the State of Texas' First Court of Appeals in Houston, destroys the entire Texas statutory scheme for assessing child support. Since it is now the law in Texas, the legal precedent in *Nordstrom* will have destructive consequences for thousands of women and children in Texas.

The Family Support Act of 1988 allows states to receive funding under Title IV-D of the Social Security Act if they meet certain federal requirements. One condition of federal funding is that the state must establish guidelines by law or by judicial or administrative action for setting and modifying child support award amounts within the State.[1] The key to child support enforcement

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[1] 42 U.S.C. §667(a) (1994). At a minimum, the child support guidelines were designed to do the following: (1) Take into consideration all earnings and income of the absent parent; (2) Be based on specific descriptive and numeric criteria; (3) Compute an actual child support amount; (4) Be used in both judicial and administrative proceedings; (5) Be a rebuttable presumption of the correct level of support for a child under the particular circumstances; and (6) Provide for a child's health care needs by means of health insurance coverage or another arrangement. See 45 C.F.R. §302.56 (c) and (f) (1997).

is the cooperation of state court judges. Child support cannot be collected without an order from a state court.[2]

In the *Nordstrom* case, the Texas First Court of Appeals violated the Family Support Act, as amended, and its implementing federal regulations by the Department of Health and Human Services, (OCSE) by: (1) failing to compute an actual child support amount; (2) failing to consider all of the income of the absent parent as prescribed in the federal regulations and the conforming Texas state statutes; and by (3) failing to apply the entire child support guidelines statutory scheme of the Texas Family Code. The Texas First Court of Appeals' decision is, therefore, void as a matter of law.

Whenever Congress acts within the scope of a delegated power, such as the Commerce Clause of the United States Constitution, the Supremacy Clause renders any conflicting state or local law or action void. Federal supersession occurs when a valid act of Congress or federal regulation supersedes any state or local action that conflicts with the federal rule – whether by commanding

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[2]Congress made the federal guidelines mandatory for state court judges to follow. An Office of Child Support Enforcement OCSE Final Rule, (Action Transmittal, AT-91-02) states in pertinent part:

> Section 103 of Pub. L. 100-485 amended section 467 of the [Family Support] Act, effective October 13, 1989, to **delete the clause that the State guidelines need not be binding upon judges or other officials and to require that the States' guidelines be used to create a rebuttable presumption in any judicial or administrative proceeding** for the award of child support that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded. . . . (emphasis added) Lodging B.

or encouraging conduct inconsistent with that required by the federal rule, or by forbidding or discouraging conduct the federal rule is designed to foster.[3]

A. The Success Of The Welfare Reform Act Depends On State Court Orders Assessing Child Support Based On Federally Mandated Child Support Guidelines.

Congress has passed more and related legislation in this area, including The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public law.

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[3]The Supreme Court has held that the federal courts have the power to order state officials to comply with federal law. See *Puerto Rico v. Branstad*, 483 U.S. 219, 228 (1987); *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 659 (1979); *Illinois v. City of Milwaukee*, 406 U.S. 91, 106-108 (1972); *Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958); and *Brown v. Board of Education*, 349 U.S. 294, 300 (1955). *Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218, 230-231 (1947), outlines the federal tests of supersession, where there is no express provision of Federal preemption in the Federal statutes.

> So we start with the assumption that the historic police powers of the States were not be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. . . . Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the Federal system will be assumed to preclude enforcement of states laws on the same subject. . . Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. . . Or the state policy may produce a result inconsistent with the objective of the federal statute.

City of Burbank v. Lockheed Air Terminal, 411 U.S. *Pennsylvania v. Nelson*, 350 U.S. 497 (1956), *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173 (1942), and *Liner v. Jafco*, 375 U.S. 301 (1964).

104-193 (the "Welfare Reform Act" as it is popularly known), which depends for its success, on state court orders assessing child support based on the federally mandated guidelines.[4]

In the Welfare Reform Act, Congress mandated new federal and state case registries; new federal and state new hire directories; centralized collection and disbursement of support payments; expanded enforcement authority through – license sanctions, administrative lien procedures, administrative subpoena authority, imposition of work activity, and other provisions which work to compel payment by non-custodial parents. The Welfare Reform Act also mandated state adoption of the Uniform Interstate Family Support Act, simplified provisions for

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[4]See also The Social Services Amendments of 1974, Public Law, 93-647, which created Title IV-D of the Social Security Act – the Child Support Enforcement Program. In 1984, the Child Support Enforcement Amendments of 1984, Public Law 98-378, required states to use mandatory wage withholding; expedited processes for establishing and enforcing support orders; state income tax refund interception; liens against real and personal property; consumer credit reporting, and paternity establishment any time before a child's 18th birthday. In 1988, The Family Support Act, Public Law 100-485, made numerous changes to the child support program, including: requiring immediate wage withholding for child support orders issued or modified on or after November 1, 1990, unless there is good cause or a written agreement; mandating the use of child support guidelines by judges and other judicial decision makers; requiring review and adjustment of orders; setting program standards and time frames; and requiring states to develop automated systems. The Omnibus Reconciliation Act of 1993, Public Law 103-66, made important changes to paternity establishment and medical support. States are required to have simple civil processes for paternity establishment, including hospital based programs. Insurers are prohibited from discriminating against children because they are born out-of-wedlock or not claimed on a parent's federal income tax. Lodging A.

review and adjustment of support orders, and streamlined paternity establishment provisions. During the last session, Congress passed the Child Support Performance and Incentive Act of 1998 (CSPIA). CSPIA contains a penalty procedure for states who fail to install automated data processing, so the federal government can monitor state performance on child support collections. Sections 201 and 458A amend Title VI of the Social Security Act to allow for incentive payments for states based on their success in child support collections. The "incentive payment pool" for the states is $422,000,000 for fiscal year 2000, and rises to $483,000,000 for fiscal year 2008. Congress also passed the "Deadbeat Parents Punishment Act of 1998," which makes failure to pay child support a federal felony.

B. The States Changed Their Child Support Statutes To Conform Specifically With Federal Requirements.

Since the states were given some latitude in developing their own guidelines, and enacting them into law, the federal methodologies and federal intent were published in January 1994, by the U.S. Department of Health and Human Services Administration for Children and Families Office of Child Support Enforcement in *Child Support Guidelines: The Next Generation*, M. Haynes (Federal Handbook, Lodging A). It describes the federal mandates, and presents the federal models used by the states to develop and enact their child support guidelines. A number of the Texas statutes track word for word the language in the Federal Handbook, as well as the language in OCSE Action Transmittals.

It is clear that child support has become a major federal priority. According to the Federal Handbook, Congress anticipated that because a state's guidelines would be based on actual child rearing data, that child support orders would better reflect the actual costs of raising children. Congress' expectation that child support will be based on the actual costs of raising a child is reflected in the requirement of Texas' §154.126 for the trial court to find "the total needs of the child." In the instant case, Petitioner presented detailed evidence of the costs of raising the child, but the trial court failed to find any needs of the child.

Chapter 3, "Determination of Income," discusses the types of income that are to be included (all types of income) in determining the income of the obligor. Texas' §154.062 (Net Resources) is clearly derived from the specific OCSE regulatory requirement that "all of the income sources of the absent parent" be ascertained and used to calculate child support. In the instant case, the trial court failed to consider the obligor's deferred income which totaled through 1995, exceeded half a million dollars. Verification of all of the absent parent's income was a major federal concern, including verification of self-employment income, imputed income and underemployment. The federal intent is closely tracked in the Texas Family Code statutes concerning the verification of income, including Texas' §154.065 (Self-Employment Income), §154.066 (Intentional Unemployment or Underemployment), §154.067 (Deemed Income) and §154.068 (Wage and Salary Presumption). App. 40a.

The issues of incorporating multiple families are discussed in the Federal Handbook, using a specific mathematical formula to assist in the calculation. Section 154.-129 of the Texas Family Code (Alternative Method of

Computing Support for Children in More Than One Household) is a direct reflection of these computations, and the mandates of the federal government's guideline methodology, as are all of the other state statutes. App. 00a.

Current federal law does not require the states to adopt a particular type of support guideline. Although the state guideline calculations vary, they are based on three models: the percentage of income model, the income-shares model, and the Delaware Melson formula. After providing for basic needs, the Delaware Melson formula allows a child to benefit from each parent's remaining income. Lodging A. Texas has adopted a variant of the Delaware Melson formula for §154.126 cases (Application of Guidelines to Net Resources of More Than $6,000 Monthly), the applicable statute in the *Nordstrom* case. App. 47a. Section 154.126 has two parts. Subsection (a) requires the court to use the figure from a percentage of income chart in §154.125 (Application of Guidelines to Net Resources of $6,000 or Less) as a starting point or "presumptive award." Subsection (b) requires that the presumptive award be subtracted from the "proven total needs of the child." The remaining amount of the child's needs, called the "additional need," is then "allocated between the parties . . . according to the circumstances of the parties." It is therefore a requirement of the statute to actually calculate the needs of the child and find the income of the non-custodial parent, in order to perform the Delaware Melson analysis of §154.126.

Chapter 7 of the Federal Handbook, "Adding to the Basic Support Obligation," directs the states to include provisions for extraordinary expenses, health care, child

care and the costs of a post-secondary education. "Because the goal in most states is to provide children with [a level of child support] to support a standard of living as close as possible to what they would have had if the family had been intact, all states need to address these issues." Lodging A, Chapter 7 at p. 62. Chapter 9 of the Federal Handbook, "Criteria From State Child Support Guidelines," discusses what in Texas are the §154.-123 Factors to Consider. These factors which would allow deviations from the guidelines include multiple families, extraordinary health care costs, health insurance premiums, child care expenses, post secondary education costs, tax considerations and extended custody and visitation arrangements. It is the federal intent that all of these factors are to be used in all child support cases. There is no question that the Texas Legislature enacted its entire statutory scheme in 1993 and revised it in 1995 to conform with closely federal intent. However, as discussed below, the Texas First Court of Appeals has taken a state action which is contrary to federal mandate (as well as conforming state mandate), and it must fail in the face of federal supremacy.

C. The First Court Of Appeals Has Affirmed Incorrect Constructions Of Four Of The Most Important Sections Of The Texas Family Code.

In a few short pages of its Opinion, the First Court of Appeals has excused the trial court from finding the needs of the child. Now, the trial court only has to "consider" the needs of the child. It has eliminated the use of the §154.123 factors, established a misconstruction of §154.126, and nullified §154.126(b), which

addresses the additional needs of the child. This will disadvantage single mothers in Texas, as they are very likely to have the lower income. It has made retroactive child support unattainable. In essence, the Court of Appeals has decided that the "guidelines" consist only of the percentage charts in §154.125.

Nordstrom affirms clearly incorrect statutory constructions, findings and applications of §§154.126, 154.130 (Findings in a Child Support Order), 154.131 (Application of Guidelines to Retroactive) and 154.062 (Net Resources) of the Texas Family Code. The Trial Court ignored the evidence and proof offered by Petitioner without any explanation or any finding of the needs of the child. At the same time, the Court in *Nordstrom* allowed counsel for the absent parent to arbitrarily pick and choose items from the custodial parent's shorthand rendition of monthly expenses, App. 57a, and make up and change the figures proven by the Petitioner by her testimony and physical evidence, in order to achieve an artificially reduced level of the child's needs.

The trial court used a 1994 tax return to determine Respondent's income, and specifically excluded deferred income. App. 71a. However, the test year in this case was 1995, where Respondent had reported income of over $238,000. App. 84a.

Further, Texas' carefully worked out version of the Delaware Melson formula has been completely contravened by the Court of Appeals' misconstruction of the proportionate mathematical formula of §154.126, and by its holding that §154.126(b) is optional, thereby establishing a ceiling of the statutory minimum, instead

of the floor intended by the statute. Directly applicable to this case, Chapter 1 of the Federal Handbook, "An Overview of Child Support Guidelines in the United States", at pp. 3-4, Loding A, states:

> At the upper end of the income spectrum, it is difficult to arrive at a formula that can yield fair results . . . .It seems reasonable then, that the guidelines themselves should specify an income level above which the formula no longer applies. . . . The guidelines should specify that the upper limit of the formula should serve as a "jumping off point". . . . A more questionable element of guidelines in some states is an absolute ceiling on the amount of child support. For example, one state provides that obligors with net income higher than $4,000 per month cannot have child support set at a higher level than if the income were $4,000 per month. **This conflicts directly with economic evidence on the costs of child rearing. By setting an absolute ceiling on child support that limits effective application of the guidelines to a fraction of cases, this author questions whether this provision complies with federal intent.** (emphasis added)

The Court of Appeals has specifically approved a completely incorrect construction of §154.126, which takes 20% of the custodial mother's net monthly income under the percentage tables in §154.125 (Application of Guidelines to Net Resources of $6,000 or Less), and adds the [$1200] dollar minimum from the same chart that Respondent is required to pay under §154.126(a), and then argues that the sum is more than enough to meet the artificially reduced needs of the child. The result is an award of child support in which the absent parent, who has had a consistently high income for many years, pays

less than 8% his net monthly income U.S.-based income for child support – whereas, if he has a substantially lower income, he would pay a mandatory 20% according to the percentage of income charts in §154.125. This circumstance creates a child support apportionment where the mother, with less than one third of the income and assets of the father, pays two thirds of the needs of the child, as she has done for years. This decision will place mothers in a position where they are spending their every available earned dollar to support their children, run the danger of going into debt and cannot save for college – making college a financial impossibility for many children in Texas, since child support ceases at age 18.

The Court of Appeals, moreover, has improperly interpreted the statute providing for retroactive child support, §154.131, and has guaranteed that years of past escalating inequities in support burdening custodial parents will never be addressed. The Court of Appeals also adds a requirement of "need" that is not in the statute, and has disregarded the guidance of the Texas Supreme Court in *In the Interest of B.I.V., A Minor Child*, 923 S.W.2d 573 (Tex. 1996) which interprets the legislative intent of the retroactive child support statute to be one of economic fairness. Furthermore, affirming an award of attorney's fees against the custodial mother, despite a finding of a material and substantial change justifying an increase in child support, the *Nordstrom* decision has a chilling effect, ensuring that thousands of women in Texas will not seek the support to which their children are entitled.

D. Contrary To Federal And State Mandate, The First Court Of Appeals Has Excused The Trial Court From Finding The Needs Of The Child.

Congress anticipated that because a state's guidelines would be based on child rearing data, that child support orders would better reflect the actual costs of raising children.[5] Further, Congress' expectation that child support will be based on the actual costs of raising a child is reflected in the requirement of §154.-126 for the trial court to find "the total needs of the child." Consistent with the manner of similar cases reported in Texas since 1993,[6] Petitioner proved that the needs of the child amounted to $4,065.00 per month, based on 1995 expenses (including additional needs, and exclusive of legal fees) by submitting canceled checks, billings, receipts, charge card records and other documentation, as supplemented by Petitioner's testimony. Following cross-examination by Respondent, and numerous tabulations and calculations, the documentation provided of Petitioner's expenses closely supported the figures in her shorthand rendition. App. 73a and App. 74a. The findings of the trial court should have reflected those figures. On March 25, 1996 and April 11, 1996, the trial court issued §154.130 findings, App. 3a,

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[5] 45 C.F.R. §302.56(c) and (f) (1997).

[6] *In Interest of Pecht*, 874 S.W. 2d 797 at 802 (Tex. App. - Texarkana, 1994, no writ), *Clark v. Jamison*, 874 S.W. 2d 312 at 316 (Tex. App. - Houston [14th Dist.], 1994, no writ), *Ikard v. Ikard*, 819 S.W. 2d 644 (Tex. App. - El Paso, 1991, no writ), *Thomas v. Thomas*, 895 S.W. 2d 896 (Tex. App. - Waco, 1995, no writ), *Sohocki v. Sohocki*, 730 S.W. 2d 30 (Tex. App. - Corpus Christi, 1987, no writ), and *Belcher v. Belcher*, 808 S.W. 2d 202 at 204-207 (Tex. App. - El Paso, 1991, reh'g overruled).

which were identical in all significant respects to the findings from the January 12, 1996 hearing in front of Magistrate Bruce Kessler, App. 4a, with the addition of the assessment of attorney's fees against Petitioner, the custodial mother. The trial court ignored the testimony and proof, and specifically failed to make any findings as to the needs of the child.

The First Court of Appeals only speculated or provided excuses for why the Judge failed to find the needs of the child. But it does not require an explanation, holding that these matters are within the judge's discretion. App. 18a.

Now the following method of determining the needs of the child is acceptable in Texas. As shown from the record, Respondent's attorney achieved a reduced "need" figure for the child by eliminating major categories of household expense, making up and changing proved figures and picking and choosing from Petitioner's shorthand rendition, App. 57a, while the trial court judge wrote them down. App. 57a.

> Miss Broussard [Attorney for Respondents]: Okay, do you actually know how many miles in a year you spend going back and forth to town for Sarah's needs only . . .?
>
> [Miss Broussard suggests a dollar figure for transportation for Sarah and writes it on the blackboard.]
>
> Miss Broussard: Judge, is there anything on here that you want to copy down anything [sic]?
>
> The Court: I have it all.
>
> Miss Broussard: Okay.
>
> . . . .
>
> [Miss Broussard adds 20% of Petitioner's net monthly income to the statutory minimum ($1,200.00) for Respondent, which constitutes eight percent

(8%) of his monthly income to reach a figure of $2,292.00 for the needs of the child. She multiplies it by thirty-eight percent (38%) for housing expenses.]

Miss Broussard: Tell me what thirty-eight percent (38%) of $2,292.00 is.

Mrs. Nordstrom: $870.96.

Miss Broussard: I'm going to read off some of the numbers from your Exhibit No. 14 [Petitioner's shorthand rendition of her expenses] and ask you to add them together for me, okay?

Mrs. Nordstrom: All right.

Miss Broussard: So starting off with this $871.00, add in $725.00.

Ms. Detamore; Judge I have to object. That's a misstatement of the witness. $871.00 is [] not on her exhibit. That's a figure that Miss Brossard just [] provided by asking my client what's thirty-eight percent (38%) of two other figures.

Miss Brossard: All right, the $275.00, the $150.00, and I'm going to put a star by that one because we're going to come back to that one, $50.00 for doctor and dentist, school expenses of $20.00, lunches of $120.00, hair cuts of $12.00, clothing of $200.00, entertainment of $100.00, allowance of $40.00, piano lessons of $60.00 and sports equipment of $30.00, can you tell me what that number is when you total it all up?

Mrs. Nordstrom: I came up with $1,928.00.

The trial court must find the total needs of the child, in order to properly apply the formula of §154.126. All of the needs of the child do not just include actual dollars spent directly on the child, but a share of indirect expenses and the costs of maintaining a household, as a

matter of law. As noted above, a share of these expenses is attributed to the child in all other recent reported Texas cases.[7] Further, these categories of indirect and household expense are listed in the standard from Financial Information Statement used by the Texas family courts. App. 75a.

Nonetheless, the Court of Appeals has held that the trial court has the discretion to determine the needs of the child in this pick and choose fashion, stating, "However, we have already found that no abuse of discretion occurred in determining the needs of the child."[8] The result in the real world is that Petitioner must make up the differential between the "needs" that her ex-husband's counsel selected, and her daughter's actual total needs.

E. The Court Of Appeals Has Destroyed The Proper Interpretation And Application Of Texas' Version Of The Delaware Melson Formula.

As stated above, the trial court did not award additional need because it failed to follow the requirement of §154.126 to find the total needs of the child. Further, contrary to the clear mandate of the statute, counsel for Respondent successfully argued that the total of twenty percent (20%) of Petitioner's net monthly income

---

[7] See ftn. 6.

[8] Amazingly, the Court of Appeals took a page from Respondent's brief and attacked the character of the mother, without checking the truth contained in the record, and in so doing, found another way to disregard the proven needs of the child. Petitioner addressed all of Respondent's allegations in a Supplemental Brief on Rehearing filed in the First Court of Appeals on January 2, 1998.

and eight percent (8%) of Respondent's monthly U.S. based income ($2,292.00) are more than sufficient to meet the "needs" of the child (the reduced figure of §1,928.00). App. 59a. The First Court of Appeals agreed, stating:

> During her testimony, Petitioner agreed that, if the twenty percent (20%) guideline amount were applied to her net resources, the resulting amount would be $1,090.00 per month. When added to Peter's $1,200.00 obligation, the total would be $2,292.00 per month for the support of the child. In its discretion, the court could have found this amount sufficient to satisfy any needs Petitioner actually proved.

Section 154.126(b) clearly mandates that the responsibility for meeting the additional needs of the child above the $1,200.00 threshold is a *proportionate* responsibility. There is a ratio of 3 to 1 between the "circumstances" of Respondent as opposed to the "circumstances" of Petitioner. App. 70a. The apportionment of additional need is simple math. However, in addition to approving the wrong methodology, as described above, the Court of Appeals held,

> Notwithstanding the needs Petitioner may have proven, Section 154.126 vests the court with *discretion* to award additional amounts. It *mandates* only that the court *consider* the needs of the child and the parties' income in arriving at the decision . . . . (emphasis added) App. 18a.

By holding that the trial court may refuse to award child support to cover the "additional needs" of the child in §154.126(b), the court has made the statutory formula for addressing additional need a nullity. This effectively sets a ceiling of the statutory minimum ($1,200.00) for

a high salaried absent parent, instead of a floor intended by the statute.

As noted by the First Court of Appeals, Petitioner did state that she would be happy to follow the guidelines if Respondent followed the guidelines. The Court of Appeals has applied two different standards to the term "guidelines." For Petitioner, "guidelines" meant 20 percent of her net monthly income on the chart on §154.125. For Respondent, "guidelines" meant the $1200 statutory maximum dollar figure on the chart, which is less than 8 percent of his US based income, not 20 percent of his net income – a totally different standard. App. 19a. This approach, now legal precedent, unfairly burdens the parent with the lesser income, and is completely contrary to the mandate and the intent of §154.126(b). The $1200 is a starting point for an obligor who can afford more.

By allowing the trial court complete discretion to ignore the needs of the child, the *Nordstrom* decision opens the door for courts to completely avoid the requirement of §154.126(b) to provide for additional needs according to the "income and circumstances of the parties."

Contrary to recent cases, the Court of Appeals has held that the language of §154.126(b) requiring the trial court to consider the "income of the parties" and "proven needs of the child" to address the additional needs of the child are the only "factors to be considered in awarding additional support." Citing *Rodriguez v. Rodriguez*, 860 S.W.2d 414 (Tex. 1993), a Texas Supreme court decision superseded by the 1993 and 1995 revisions to the Texas Family Code, the Court of Appeal's holding eliminates considerations of "lifestyle" and the §154.123 factors to consider.

F. The First Court Of Appeals Has Dodged The Federal And State Requirements To Find All Of The Income Sources Of The Absent Parent, And Allowed The Trial Court To Specifically Exclude Substantial Deferred Income.

According to the Federal Handbook, Chapter 3, "Determination of Income," Lodging A, discusses the types of income that are to be included (all types of income) in determining the income of the obligor. Section 154.062 (Net Resources) is clearly derived from the specific OCSE regulatory requirement that "all of the income sources of the absent parent" be ascertained and used to calculate child support.

The trial court and the *Nordstrom* decision ignored the requirements of the statute to properly make this finding, and include the appropriate items of income. Despite voluminous testimony and evidence as to Respondent's income, in Petitioner's and Respondent's Exhibits, the trial court used a figure derived from Respondent's 1994 income tax return, instead of his 1995 income for the test year. The trial court did not include approximately thirty percent (30%) of additional compensation for deferred income plans, or for Respondent's Shell Pension Plan.

> The Court: . . . . The Court's findings that Peter John Nordstrom's net monthly resources to be a total amount of $7,654.66. From his 1994 tax return, Movant's No. 1, the Court finds that he has additional investment income of $6,715.00 per year making it an additional $559.42 per month in additional income.
>
> Miss Broussard: And, Your Honor, that number, the $559.00 is included in the $7,654.66 you just found.
>
> The Court: Okay.

Miss Broussard: It is his salary, plus his investment income.

The Court: That's right, the $7,654.66 includes this additional investment income and his salary for a total net resources.

Ms. Detamore: Judge, for the record, it's my understanding and I would object to the finding that the court did not also include the deferred income that he has received or would be receiving in the future deposited by Shell into Deferred Income Retirement Accounts. So for the record, I object that the Court does not include any of those amounts in his net resources.

The Court: The Court fully acknowledges your objection and records it in the record and overrules your objection.

It was proven that Respondent had a gross income of $238,980.39 in 1995, where he was on assignment in the Netherlands. In 1994 he had a gross income of $165,888.-00. He testified that his U.S. based income was $125,000.-00, in addition to deferred income and various other of the proper calculation of Respondent's net resources under the statute by claiming that Petitioner had waived the issue. As Petitioner argued in her brief on appeal, there was clearly a miscalculation of Respondent's income by the trial court.

G. Contrary To Federal And State Mandate, The First Court Of Appeals Had Eliminated Additional Factors Which Are Intended To Be Included In The Child Support Calculation.

Chapter 7 of the Federal Handbook, "Adding to the Basic Support obligation," discusses extraordinary expenses, health care, child care and the costs of a post-secondary education. "Because the goal in most states is to provide children with a standard of living as close as possible to what they would have had if the family had been intact, all states need to address these issues." at p. 62. Chapter 9, "Criteria From State Child Support Guidelines," discusses what in Texas are the §154.123 Factors to Consider, which are intended to increase or reduce the initial guideline child support amount. These factors which would allow deviations from the guidelines, including multiple families, extraordinary health care costs, health insurance premiums, child care expenses, post secondary education costs, tax considerations and extended custody and visitation arrangements. It is the federal intent that the factors are to be used in all cases. The parallels between the Federal Handbook and the Texas Family Code are obvious.

Chapter 1 of the Federal Handbook, Lodging A, "An Overview of Child Support Guidelines in the United States," states, at p. 4, "Each state must establish criteria under which application of the guidelines might be unjust or inappropriate; thus, the states must have a list of specific deviation criteria." Yet, it is clear in Texas, that the "guidelines" are viewed only as the percentage of income charts in §154.125.

H. The First Court Of Appeals Has Misinterpreted The 1995 Revisions To The Texas Family Code Which Make Retroactive Child Support Mandatory In Response To An OCSE Action Transmittal.

The OCSE issued Action Transmittal (AT-93-04) on March 22, 1993, Lodging A, addressing the issue of awarding retroactive child support as follows:

> *USE OF PRESUMPTIVE GUIDELINES IN SETTING SUPPORT FOR PRIOR PERIODS*
>
> In setting support awards, states are required, at a minimum, to take into consideration the obligor's earnings and income, in accordance with 45 CFR 302.56(c) (1). The establishment of a child support award covering a prior period must be based on guidelines and take into consideration either the current earing and income at the time the order is set, or the obligor's earnings and income during the prior period. The award of back support is not required under Federal rules but may be appropriate in accordance with State law.

The 1995 Revisions to the Family Code show that the Texas legislature responded to the OSCE. It amended and added several statutes, which read together intend retroactive child support to be mandatory, by statutory construction. Section 154.009 (Retroactive Child Support) was added to Texas Family Code in 1995 (App. 38a). It was derived from 14.062, its predecessor in the 1993 Texas Family Code. App. 35a. In the 1995 Revisions, the legislature removed the requirement that the court be guided by the evidentiary factors contained in 14.053(1). (Bolded in App. C). This language was replaced with §154.009(b) "shall" language which states: "*In ordering*

retroactive child support, the court shall apply the child support guidelines provided by this chapter" (emphasis added). Then 154.131 logically follows as it is entitled "Application of Guidelines To Retroactive Support." App. 52a. These are the "*guidelines [for retroactive child support] provided by this chapter.*" The legislature took out "evidentiary factors" of 14.053(1), which are presumed to be left to the discretion of the trial court. According to the rules of statutory construction, omissions from existing provisions when new provisions are enacted are presumed to be intentional.

Section 156.401(b) of the Texas Family Code provides that a child support order may be modified retroactively back to either the date of service of citation or to the appearance date of the obligor in the suit to modify. App. 54a. Petitioner argued below that the statutes read together shift the burden of proof to the obligor after the obligee has plead for retroactive child support. Although this interpretation wholly is consistent with OCSE intent, the court did not apply this standard.

The Texas Supreme Court held, in *In the Interest of B.I.V.*:

> Retroactive child support may represent . . . funds owed the supporting parent to discharge his or her proportionate duty of financial support to the child. . . . [P] ayment of child support arrearages 'compensates for the wrong to the child at least as much as it reimburses the custodial parent for monies spent on the child.' . . . [T]he legislature has recognized that the supporting parent suffers a financial loss as well, for which he or she is entitled to be compensated. 923 S.W.2d at 925

The Texas Supreme Court has recognized that retroactive child support represents a proportionate duty to support of the child, "but also the right to reimbursement afforded someone who has supported the child in the meantime." Retroactive child support is a mechanism to remedy unfairness, including unfairness created and which continues to escalate and compound over time created by an inadequate amount of child support set under a legislative scheme (in effect at the time of the divorce) which was discarded by the legislature in 1993.

A burden shifting approach is used to determine retroactive child support in paternity cases, and it should be used in child support modification cases. App. 00a. Instead of requiring Respondent to meet his burden of proof under §154.131, that retroactive child support represented a financial hardship – a fact he clearly could not prove; the *Nordstrom* decision adds a new requirement that is not in the statute, requiring the obligee/mother must prove a "need" for retroactive child support. Retroactive child support is rarely awarded in child support modification cases, despite the wording and construction of the Texas statutes. Yet, it is clear that the Texas legislature modified the 1995 Texas Family Code to make retroactive child support, based on the guidelines, mandatory back to the date of service or filing of the suit for modification, consistent with federal intent.

I. By Assessing The Attorneys' Fees Of The Absent Father, Who Had A Reported Income Of $238,-980.39 Against The Custodial Mother, The Court Of Appeals Has Sent A Chilling Message To The Single Mothers Of Texas, As To What They Can Expect From The Texas Family Courts.

The Court of Appeals upheld the award of attorney's fees against the custodial mother, despite the fact that the trial court found a change in circumstances justifying a modification in child support, and awarded more child support then awarded under the original divorce decree in 1989. This increase in child support was ordered even without a finding that the award against the custodial parent will benefit the child. The assessment of attorney's fees against the custodial mother is contrary to every reported case in Texas in memory. Respondent has not disputed this during the state appeals process.[9] This holding will discourage thousands of custodial parents from seeking the child support they are entitled to under the Family Code, and effectively bars them from access to the courts. The assessment of attorney's fees against Petitioner was a punishment for appealing Magistrate

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[9] This is settled law in Texas. *Drexel v. McCutcheon*, 604 S.W. 2d 430, 435 (Tex.Civ.App.-Waco 1980). In *Daniels v. Allen*, 811 S.W. 2d 278 (Tex. App.-Tyler 1991, no writ), the Court of Appeals affirmed the award of attorneys fees to the custodial parent as "necessaries of the child." See also *Marichal v. Marichal*, 768 S.W. 2d 383 (Tex. App. - Houston [14th Dist.] 1992, no writ) [this case was cited incorrectly by the First Court of Appeals for the opposite proposition for which it stood]. The Court of Appeals claimed that Petitioner had waived this issue. She did not – it was specifically included as an issue in Petitioner's revised brief. Further, §11.18 of the Texas Family Code allows reasonable attorneys fees to be taxed as costs.

Kessler's hearing on January 6, 1996. As previously noted, the bench judge, Judge Galik, of the 245th District Court, ignored the evidence presented by petitioner, and rubber-stamped Magistrate Kessler in all major respects.

The Court of Appeals has created a scenario where a single mother, bearing the overwhelming cost of supporting a child, can wait for a substantial period of time on a family court docket for a modification, present her receipts, bills, canceled checks and testimony as to the needs of the child, and can be dealt with contrary to statute by the trial court. She runs the risk of being booted out the door with a minimal amount of child support, openly disparaged, and assessed with her ex-husband's attorney's fees, no matter how high his income. The First Court of Appeals has made this law in Texas, and thousands of children will suffer for it.

CONCLUSION

The *Nordstrom* decision sets a dangerous precedent in Texas that will have a devastating impact on its children, now and in the future. If this decision is allowed to stand, there is a risk that the First Court of Appeals' holdings and misconstructions of Texas' child support statutes could spread to the family courts of other states. Congress has invested heavily in the success of the child support guidelines which is has mandated. The lack of cooperation by state court judges in this area threatens to undermine major federal legislation and federal programs. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 1, 1998

Supreme Court, U.S.
FILED

98 921 DEC 1 1998

No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

CYNTHIA F. NORDSTROM,

Petitioner,

v.

PETER J. NORDSTROM,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF TEXAS

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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88 PP

Page

TABLE OF CONTENTS

Appendix A – Trial Court's Findings of Fact and Conclusions of Law 1a
w/attached Findings of Magistrate Bruce Kessler (signed by Judge Galik).....5a

Appendix B – Opinion of the Court of Appeals for the First District of Texas (11/6/97).....7a
w/attached denial of Petition for Review by the Texas Supreme Court (7/16/98) 27a

Appendix C – Texas Family Code Section 14.053(1993).....28a

Appendix D – Texas Family Code Section 14.062 (1995).....35a

Appendix E – Texas Family Code Section 106.002(1993).....37a

Appendix F – Texas Family Code Section 154.009 (1995).....38a

Appendix G – Texas Family Code Sections 154.062, 154.065 Through 154.068.....39a

Appendix H – Texas Family Code Sections 154.121 Through 154.131 .....43a

Appendix I – Texas Family Code Section 156.401.....54a

Appendix J – Chapter 42, United States Code §667 .....55a

Appendix K – Excerpts From Transcript Of Proceedings of 3/15/96 .....57a

Appendix L – Excerpts From Transcript Of Proceedings of 3/15/96 .....59a

Page

Appendix M – Excerpts From Transcript Of Proceedings of 3/15/96 .....65a

Appendix N – Excerpts From Transcript Of Proceedings of 3/20/96 .....67a

Appendix O – Excerpts From Transcript Of Proceedings of 3/20/96 .....71a

Appendix P – Monthly Expense Statements:
Petitioner's Exhibit 14 – Shorthand Rendition of the Needs of the Child 73a

Petitioner's Exhibit 13 – Financial Information Statement 75a

Petitioner's Exhibit 29 – Respondent's Financial Information Statement 81a

Appendix Q – Respondent's W-2 Wage and Tax Statement (1995) (Petitioner's Exhibit 16) 84a

APPENDIX A

NO. 87-01226

IN THE DISTRICT COURT
245TH JUDICIAL DISTRICT
HARRIS COUNTY, TEXAS

IN THE MATTER OF
THE MARRIAGE OF:

CYNTHIA F. NORDSTROM
AND
PETER JOHN NORDSTROM

AND IN THE INTEREST OF:
SARAH ELIZABETH NORDSTROM,
A CHILD

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

Date of Hearing

On March 15 and 20, 1996, trial was had on CYNTHIA F. NORDSTROM's Motion To Modify in Suit Affecting the Parent-Child Relationship and CYNTHIA F. NORDSTROM's Movant's Motion for Contempt and For Clarification.

Appearances

Movant, CYNTHIA F. NORDSTROM, Social Security number 318-46-7101, driver's license number ——————, State of Virginia, appeared in person and by attorney and announced ready for trial.

Respondent, PETER JOHN NORDSTROM, Social Security number 318-46-7101, driver's license number ——————, State of Texas, appeared in person and by attorney and announced ready for trial.

Jurisdiction

The Court, having examined the pleadings and heard the evidence and argument of counsel, finds that it has continuing, exclusive jurisdiction of this cause and of all the parties and that no other court has continuing, exclusive jurisdiction. A jury was waived, and all matters in controversy, including questions of fact and of law, were submitted to the Court. All persons entitled to citation were properly cited.

Record

A record of the proceedings was made by the Official Court Reporter, Ms. Jeanine Redden.

Child

The Court finds that the following child is the subject of this suit:

NAME: SARAH ELIZABETH NORDSTROM
SEX: Female
BIRTHPLACE: Houston, Texas
BIRTH DATE: June 4, 1982
PRESENT ADDRESS:
9100 Sterling Montague Drive, Great Falls, Virginia 22066
HOME STATE:
SOCIAL SECURITY #: 450-75-6573
DRIVER'S LICENSE NO.: None

FINDINGS

The Court finds, pursuant to the stipulation of the parties, that the allegations contained in Movant's Motion To Modify in Suit Affecting the Parent-Child Relationship are true, that a material and substantial change of circumstance as to a party or a child the subject of the prior order has occurred and that the requested increase in child support is in the best interest of the child.

The Court finds that child support previously ordered by this Court is not in substantial conformity with the child support guidelines set out in the Texas Family Code.

The Court finds that the issue of the amount of child support to be ordered was submitted to the Court for trial without jury.

§154.130 Findings

The following findings of fact of the Court are made pursuant to §154.130 of the Texas Family Code on the Court's own motion:

1. The net monthly resources of the obligor, Peter John Nordstrom, per month are $7,654.66;

2. The net monthly resources of Cynthia F. Nordstrom, per month are $5,444.00;

3. The percentage applied to the obligor's net resources for child support by the actual order rendered by the court is 20% of the first $6,000.00 of Obligor's net disposable resourses;

4. The amount of child support if the percentage guidelines are applied to the first $6,000.00 of the obligor's net resources is $1,200.00;

5. The court, having heard evidence and the argument of counsel, finds Cynthia F. Nordstrom has failed to present sufficient evidence to cause the Court to vary from the percentage guidelines in assessing child support beyond the $6,000.00 suggested ceiling;

6. The application of the percentage guidelines in this case is just and appropriate.

CONCLUSIONS OF LAW

1. There has been a material and substantial change of circumstances of a party or of a child the subject of the Court's Final Decree of Divorce in the above-referenced cause number.

2. The child support previously ordered by this Court is not presently in substantial conformity with the child support guidelines set out in the Texas Family Code, as amended.

3. An increase in child support would be in the best interests of the minor child the subject of this suit.

4. The proper amount of monthly child support owed by Peter J. Nordstrom is $1,200.00 per month.

5. Cynthia F. Nordstrom's request for a child support increase retroactive to the date of filing is unsupported by the evidence.

6. Peter J. Nordstrom was not in contempt of this Court as asserted in Cynthia J. Nordstrom's Motion for Contempt.

SIGNED this 11th day of June, 1996.

/s/ Annette Galik
JUDGE PRESIDING

Cause Number 87-01266

In the District Court of
Harris County, Texas
245th Judicial District

In the matter of the marriage of
Cynthia Nordstrom
and
Peter John Nordstrom,
and in the interest of
Sarah Elizabeth Nordstrom,
a minor child

FINDINGS IN CHILD SUPPORT ORDER

Pursuant to Cynthia Nordstrom's Request for Findings in Child Support Order, the Court makes the following findings in accordance with Texas Family Code section 154.130:

1. the monthly net resources of the obligor per month are in excess of $6000;
2. the monthly net resources of the obligee per month are $4950;
3. the percentage applied to the obligor's net resources for child support by the actual order rendered by the court is 20% of the first $6000 of the obligor's monthly net resources;
4. the amount of child support if the percentage guidelines are applied to the first $6000 of the obligor's net resources is $1200;
5. that application of the guidelines would be both just and appropriate, and

6. pursuant to Texas Family Code section 154.126, the award of additional amounts of child support beyond that actually ordered by the court is not warranted due to the income of the parties and the proven needs of the child.

Signed this 25th day of January 1996.

/s/ Annette Galik
Presiding Judge

APPENDIX B

Opinion issued November 6, 1997

[SEAL]

In The
Court of Appeals
for the
First District of Texas

No. -1-96-00956-CV

CYNTHIA F. NORDSTROM, Appellant

V.

PETER J. NORDSTROM, Appellee

On Appeal from the 245th District Court
Harris County, Texas
Trial Court Cause No. 87-01226

OPINION

Appellant, Cynthia F. Nordstrom (Cynthia), appeals from a child support modification order. Trial was to the court. We consider whether the trial court erred by (1) not requiring appellee, Peter J. Nordstrom (Peter), whose monthly net resources exceed $6,000, to pay additional child support above the statutory guidelines; (2) not ordering an increase in child support to begin retroactively; (3) not awarding a child support judgment against

appellee for medical expenses; and (4) not awarding attorney's fees to Cynthia as the prevailing party, and instead awarding them to appellee. We affirm.

FACTUAL BACKGROUND

The parties were married on June 20, 1975. Their daughter and only child was born June 4, 1984. The parties divorced on October 20, 1989. Soon after the divorce, both Cynthia and the child moved from Houston to Virginia when Cynthia, an attorney, found a job with the Federal Energy Regulatory Commission in Washington, D.C. In 1992, Cynthia purchased a lot and built a home in a Virginia suburb. The child has lived with Cynthia since the divorce. Peter is employed as an executive at Shell Oil. He is able to see his daughter seven or eight times a year. He is based in Houston, but worked in Holland during 1995.

PROCEDURAL BACKGROUND

The agreed decree of divorce designated Cynthia managing conservator and Peter possessory conservator. In addition, the decree ordered Peter to (1) pay Cynthia $1,000 per month in child support; (2) maintain medical and dental insurance for the child; and (3) pay for one-half of the child's uninsured medical and dental expenses.

On October 11, 1994, Cynthia filed a motion to modify the original decree. She alleged that a material and substantial change had occurred to a party subject to the earlier order, and requested an increase in Peter's child support obligation.[1] She asked that the increase be

---

[1] At trial, the parties stipulated that the circumstances of the child or person affected by the order had materially and substantially changed since the order was rendered. *See* TEX. FAM. CODE

[footnote continued]

applied retroactively to the filing date of that motion, and that she be awarded attorney's fees. She later filed a motion for contempt and clarification, in which she requested that Peter be held in contempt for failing to comply with the original order, and, alternatively, requested that a child support judgment be assessed against Peter for medical insurance premiums and out-of-pocket costs he had failed to cover.

In January of 1996, the parties tried the case to the court, which later granted a new trial. The second trial, the one from which Cynthia appeals, was held on March 15 and 20, 1996. The case was again tried to the court. The trial court ordered that (1) Peter's child support obligation be increased to $1,200 per month, (2) he pay one-half of any necessary tutoring costs, (3) he reinstate health insurance coverage for the child and pay one-half of all uninsured medical costs, and (4) certain funds deposited by him pursuant to the parties' agreement and in satisfaction of his medical expense obligation be held in trust until the child reaches majority. The court also denied Cynthia's requests for retroactive application of the increase, attorney's fees, and contempt, and awarded Peter $8,600 in attorney's fees.

In the court's judgment and in separate findings of fact, the court found that (1) a material and substantial change in circumstances had occurred; (2) the amount ordered in the original decree was no longer in substantial conformity with the child support guidelines of the Family Code;[2] (3) the increased award of $1,200 pursu-

---

ANN. §156.401 (Vernon 1996) (court may modify existing child support order if circumstances of party or child have materially and substantially changed).

[2]The Family Code guidelines provide that the amount of support for one child should equal 20% of the obligor's first

[footnote continued]

ant to the Guidelines was appropriate; (4) Peter's monthly net resources equaled $7,654.66, and Cynthia's $5,444.00; (5) Cynthia failed to present sufficient evidence to cause the court to vary from the guidelines in assessing child support beyond the $6,000 ceiling;[3] and (6) retroactive application of the increase to the date of filing was unsupported by the evidence.

STANDARD OF REVIEW

A court's child support order will not be disturbed on appeal unless the complaining party shows that the order constituted a clear abuse of discretion. *Woodford v. Stamper*, 801 S.W.2d 108, 109 (Tex.1990). Once the court determines a material and substantial change has occurred, the extent of the alteration of the amount of child support also lies within the court's discretion. *Farish v. Farish*, 921 S.W.2d 538, 541 (Tex. App.-Beaumont 1966, no writ). The test for abuse of discretion is whether the trial court acted arbitrarily or unreasonably, without reference to any guiding rules or principles. *Holley v. Holley*, 964 S.W.2d 703, 706 (Tex. App.-Houston [1st Dist.] 1993, writ denied). In making this determination, the reviewing court must view the evidence in the light most favorable to the actions of the trial court and indulge every legal presumption in favor of the judgment.

$6,000 in monthly net resources. TEX. FAM. CODE ANN. §154.-125 (Vernon 1996). The Court found that Peter's monthly net resources exceeded $6,000, and pursuant to the statute ordered $1,200 per month in support, or 20% of his first $6,000 in net resources.

[3]TEX. FAM. CODE ANN. §154.126 (Vernon 1996) (court may order support above the guideline amount when obligor's net resources exceed $6,000, depending on income of parties and proven needs of the child).

Id. Abuse of discretion does not exist as long as there is some evidence of a substantive and probative character to support the decision. *Id.*

FAILURE TO AWARD SUPPORT ABOVE GUIDELINE AMOUNTS

In her first point of error, Cynthia claims the trial court abused its discretion in failing to award additional support above the statutory percentage guidelines, as the court may do if the obligor's net resources exceed $6,000. TEX. FAM. CODE ANN. §154.126 (Vernon 1996). Her point of error states that (1) she conclusively proved, as a matter of law, additional support should have been awarded pursuant to that section, or, alternatively, (2) it was against the greater weight and prepondernace of the evidence not to award additional support. However, under an abuse of discretion standard, legal and factual insufficiency are not independent, reversible grounds of error; rather, they are relevant factors in assessing whether the trial court abused its discretion. *Mai v. Mai,* 853 S.W. S.W.2d 615, 618 (Tex. App.-Houston [1st Dist.] 1993, no writ). Therefore, we will consider the legal and factual sufficiency of the evidence supporting the trial court's findings, utilizing the appropriate and well known standards of review, in disposing of Cynthia's first point of error.

A. The Family Code

The Family Code allows courts to modify child support orders whenever there has been a material and substantial change in the circumstances of the child, or a person affected by a support order. TEX. FAM. CODE ANN. §156.401(a) (Vernon 1996). If the amount of support contained in an order does not substantially conform

with the guidelines, the court may modify the order to conform with the guidelines if the modification is in the best interest of the child. TEX. FAM. CODE ANN. §156.402(b) (Vernon 1996). At trial, the parties stipulated that a material and substantial change had occurred.

The Code provides a bifurcated analysis in setting child support, depending on whether an obligor has net monthly resources above or below $6,000. Although the court may consider a wide range of factors in setting support obligations for persons who have less than $6,000 in monthly net resources, the Code provides a much narrower method for calculating the support obligation when an obligor's monthly net resources exceed $6,000, as they do in this case. TEX. FAM. CODE ANN. §§ 154.123, 154.126 (Vernon 1996); *see Rodriguez v. Rodriguez*, 860 S.W.2d 414, 418 (Tex. 1993) (holding that, absent contrary explanation by trial court in findings of fact, presumptive award may encompass other factors not limited to the needs of the child). The pertinent section concerning the calculation of support for one who has more than $6,000 in monthly net resources reads as follows:

> (a) If the obligor's net resources exceed $6,000 per month, the court shall presumptively apply the percentage guidelines to the first $6,000 of the obligor's net resources. Without further reference to the percentage recommended by these guidelines, the court may order additional amounts of child support as appropriate, depending on the income of the parties and the proven needs of the child.
>
> (b) The proper calculation of a child support order that exceeds the presumptive amount established for the first $6,000 of the obligor's net resources requires that the entire amount of the presumptive

> award be subtracted from the proven total needs of the child. After the presumptive award is subtracted, the court shall allocate between the parties the responsibility to meet the additional needs of the child according to the circumstances of the parties. However, in no event may the obligor be required to pay more child support than the greater of the presumptive amount or the amount equal to 100 percent of the proven needs of the child.

TEX. FAM. CODE ANN. §154.126 (Vernon 1996).

Section (a) grants the court discretion to order additional amounts over and above the presumptive award, depending on the income of the parties and the proven needs of the child.[4] TEX. FAM. CODE ANN. §154.126(a) (Ver-

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[4] An earlier version of the statute in effect between 1989 and 1993 read: "Without further reference to the percentage recommended by these guidelines, *the court may order additional amounts of child support as proven, depending on the needs of the child at the time of the order.*" Act of June 14, 1989, 71st Leg., R.S., ch. 617, §6, 1989 Tex. Gen. Laws 113, 282, *repealed by* Act of April 20, 1995, 74th Leg., R.S., ch. 20, §1, 1995 Tex. Gen. Laws 2030, 2039 (emphasis added). In *Rodriguez*, the supreme court held that, based on the statute, a decision to award additional support above the presumptive award could be based solely on the needs of the child. The court reasoned that the needs of the child is the only factor to be considered, because when the legislature codified the 1987 judicial guidelines, it eliminated "the lifestyle to which the child had become accustomed" and "the income of the parties" as factors in determining additional support. *See Rodriguez v. Rodriguez*, 860 S.W.2d 414, 416-417 (Tex. 1993). The court also reasoned that specific statutes prevail over general ones, and that, because this section addresses additional support for an obligor with net resources over $4,000 (now $6000), other sections of the code which provided factors to be considered in setting child support were not applicable. *Id.* The legislature has now reintroduced "income of the parties" into the analysis. Based on the supreme court's earlier interpretation of the statute and the clear language of the current statute, we hold

[footnote continued]

non 1996). If the court awards more, section (b) requires that the court first determine the proven needs of the child. TEX. FAM. CODE ANN. §154.126(b) (Vernon 1996). If the needs of the child exceed the presumptive award, the court must subtract the presumptive award from those needs. TEX. FAM. CODE ANN. §154.126(b). The court must then allocate between the parties the responsibility to meet the additional needs of the child, depending on the circumstances of the parties. TEX. FAM. CODE ANN. §154.126(b). However, the court is forbidden from requiring the obligor to pay more than 100% of the proven needs of the child. TEX. FAM. CODE ANN. §154.126(b).

What constitutes "needs" of the child has not been defined by statute or by case law. *See Rodriguez*, 860 S.W.2d at 417 n.3. However, the needs of the child are not limited to the "bare necessities of life." *Id.* In evaluating the needs of the child, and, thus, the exercise of the court's discretion in determining those needs, we are guided by the paramount principle in child support decisions: the best interest of the child. *Id.*

B. The Evidence

At trial, Cynthia introduced, without objection, an exhibit listing her necessary monthly living expenses, and the portion of those amounts attributable to the child. The list includes 23 separate items, including, among other things, the house payment, home equity loan, insurance, food, clothing entertainment, and school

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that "income of the parties" and "proven needs of the child" are the only factors to be considered in awarding additional support over the presumptive amount for an obligor with over $6,000 in monthly net resources. *See id.*; TEX. FAM. CODE ANN. §154.126 (Vernon 1996).

expenses. For seven of those expenses, she attributed one-half or close to one-half of the monthly total to the child. These include: (1) the home equity loan ($380 total, $190 child); (2) the house payment ($2,000 total, $1,000 child); (3) home maintenance expenses ($200 total, $100 child); (4) food ($550 total, $275 child); (5) utilities ($330 total, $150 child); (6) car insurance on two vehicles $126 total, $63 child); and (7) automobile expenses including gas, maintenance, parking and oil ($300 total, $150 child). The total amount listed for monthly expenses is $5,987.00, with $3,615.00 attributable to the child. In addition, the list includes several items which were separately addressed in the court's order. Cynthia listed her monthly medical insurance costs at $91, with $65 attributable to the child. She also listed monthly tutoring expenses at $360, attributing that amount to the child. In the court's order, Peter was ordered to cover the child under his insurance policy, and was ordered to pay one-half of all tutoring expenses.

However, on cross-examination, Peter called into question several expenses alleged by Cynthia. She attributed one half of her insurance on two cars to the child, but did not know how much of that amount is attributable to their main vehicle, a Pathfinder, or to the Volvo she is keeping for the child to drive when she reaches driving age. She also asked for an amount to cover maintenance on the Volvo for the child, but admitted that the child would not receive her driver's licence for two and one-half years. She attributed one-half of her work-related parking costs to the child, but then testified that it was not a direct expense for the child. She also testified that at least half, or 10,000 miles, of her yearly driving was attributable to the child, and not to her trips to and from work. However, she later admitted that she did not

actually know how many of those miles were attributable to the child. She testified that $150 a month in utilities should be attributed to the child, regardless of what the bills actually were in a particular month. She stated that, when added together, the percentage of her earnings she dedicated to housing costs was higher than 43%, and that she believes, "you spend what you have to spend to buy a house." Finally, she admitted that several of the checks she included in her food expense calculations may have been written for cash, and not for groceries.

In addition to the child's needs, the court heard testimony concerning Peter's income, including deferred income accounts and additional income provided to him by his employer to offset a cost of living increase during his year in Holland. Peter testified that his base salary was $125,500 per year. Cynthia's yearly salary is $84,053 per year.

C. Waiver

A significant portion of the trial testimony focused on the calculation of Peter's income and assets. In its findings of fact, the court found Peter's net monthly resources to be $7,654. However, Cynthia does not raise the improper calculation of Peter's net resources as a point of error on appeal. In her brief, Cynthia asserts that "[n]eedless to say his monthly net resources exceed $6,000 a month but the finding of the Court of $7,654 seems to be on the low side." Material findings of fact must be challenged by appropriate points of error in an appellant's brief, or the appellant is bound by those findings. *Cohen v. Sims*, 830 S.W.2d 285, 287 (Tex. App.-Houston [14th Dist.] 1992, writ denied). To the extent Cynthia invites this Court to review the trial court's findings concerning Peter's net monthly resources, we decline, because she has waived any error on this point.

D. Propriety of $1,200 Award

Cynthia argues that the trial court's order was unreasonable because the court acted without reference to the guiding principles of section 154.126 of the Family Code. She correctly states that, when determining whether to order support over the presumptive amount for one who has monthly net resources above $6,000, the court must look to the (1) income of the parties and (2) the proven needs of the child. TEX. FAM. CODE ANN. §154.126. However, she contends that the trial court abused its discretion in failing to award additional support because (1) she proved the needs of the child to be $3,615.00 and (2) she proved Peter's ability to pay more than the presumptive amount.

Cynthia contends that she *conclusively* proved that the needs of the child equaled $3,615.00. She refers us to *Melody v. Texas Society of Professional Engineers* for the proposition that an interested witness who is *not contradicted* by any other witness and is *free from suspicion, may* be taken as true as a matter of law. 421 S.W.2d 693, 695 (Tex. Civ. App.-Dallas 1967, no writ). She contends that, because she testified to and provided documentation of the needs of the child, without contradiction by Peter, she proved the child's needs as a matter of law. However, the trial court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Hatteberg v. Hatteberg,* 933 S.W.2d 522, 530 (Tex. App.-Houston [1st Dist] 1994, no writ). The trial court may take into consideration all the facts and surrounding circumstances in connection with the testimony of each witness, and accept or reject all or any part of that testimony. *Id.*

Contrary to Cynthia's assertions, Peter's trial counsel questioned her extensively concerning her alleged

expenses, and elicited conflicting responses on several occasions. The trial court found that she failed to present sufficient evidence to vary the award from the suggested guidelines, but did not make a finding as to what the proven needs of the child actually were. The court may have found Cynthia's evidence and testimony unpersuasive, it may have decided not to consider the expenses already provided for in the order, or it may have found the amounts allocated to the child excessive. Notwithstanding the needs Cynthia may have proven, section 154.126 vests the court with the *discretion* to award additional amounts. TEX. FAM. CODE ANN. §154.126. It *mandates* only that the court consider the needs of the child and the parties' income in arriving at that decision, and that the amount allocated to the obligor not exceed the proven needs of the child. TEX. FAM. CODE ANN. §154.126. Therefore, even if Cynthia did conclusively prove the needs of the child, it was within the court's discretion to refuse to award additional support. TEX. FAM. CODE ANN. §154.126.

Cynthia also argues that the court abused its discretion by not properly considering Peter's income in determining whether to award additional child support. In her brief, she claims it was unreasonable to require her to provide for the additional needs of the child when Peter's income was at least twice as much as her own. However, we have already found that no abuse of discretion occurred in determining the needs of the child. If the court believed Cynthia had proved any unmet needs, it must have also believed that she was able to meet those needs. Section 154.126 allows the court, based on the circumstances of the parties, to allocate between the parties any amount remaining after the presumptive award is

subtracted from the needs of the child. TEX. FAM. CODE ANN. §154.126. During her testimony, Cynthia agreed that, if the 20% guideline amount were applied to *her* net resources, the resulting amount would be $1,092 per month. When added to Peter's $1,200 obligation, the total would be $2,292 per month for the support of the child. In its discretion, the court could have found this amount sufficient to satisfy any needs Cynthia actually proved. In addition, according to the undisputed findings of the trial court, Peter did not make twice as much as Cynthia. His net resources were calculated to be $7,654.77, and hers $5,444.00. Net resources include 100% of all wage and salary income, and all other income actually received. TEX. FAM. CODE ANN. §154.062(a) (Vernon 1996). Therefore, his income, from whatever source, was not twice as much as hers.

We overrule Cynthia's first point of error.

RETROACTIVE INCREASE

In her second point of error, Cynthia asserts the trail court erred in failing to order that the increased child support begin retroactively on the date the motion to modify was filed, because Peter failed to prove such an award would not work a hardship on him. She bases this argument on sections 156.401[5] and 154.131[6] of the Family Code, which she claims should be read together.

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[5]Section 156.401 reads in pertinent part:

(a) Except as provided by Subsection (b), the court may modify an order that provides for the support of a child if the circumstances of the child or a person affected by the order have materially and substantially changed since the date of the order's rendition.

[footnote continued]

Cynthia asserts that, once the obligee pleads for retroactive child support, these sections shift the burden to the obligor to prove (1) the existence of a financial hardship and (2) that he provided necessaries to the child. Cynthia claims she is entitled to the retroactive award because, after she requested retroactive support bacd to the date of filing, Peter failed to present any evidence that a retroactive award would impose an undue hardship upon him.

While section 156.401 empowers the trial court to modify support orders retroactively, the application of the provision is not mandatory, but, rather, is left to the broad discretion of the trial court. *Willis v. Willis,* 826 S.W.2d 700, 702 (Tex. App.-Houston [14th Dist.] 1992, no writ) (interpreting earlier version of statute). It is imperative that the trial judge have broad discretion to

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(b) A support order may be modified only as to obligations accruing after the earlier of: (1) the date of service of citation; or (2) an appearance in the suit to modify.

TEX. FAM. CODE ANN. §156.401 (Vernon 1996).

[6]Section 154.131 reads in full:

(a) The child support guidelines are intended to guide the court in determining the amount of retroactive child support, if any, to be ordered.

(b) In ordering retroactive child support, the court shall consider the net resources of the obligor during the relevant time period and whether: (1) the mother of the child had made any previous attempts to motify the biological father of his paternity or probable paternity; (2) the biological father had knowledge of his paternity or probable paternity; (3) the order of retroactive child support will impose an undue financial hardship on the obligor or the obligor's family; and (4) the obligor has provided actual support or other necessaries before the filing of the action.

TEX. FAM. CODE ANN. §154.131 (Vernon 1996).

decide whether all of the facts and circumstances necessitate and justify a retroactive award of support. *Holley*, 864 S.W.2d at 707. Assuming, but not deciding, that Cynthia presents a valid argument, she asks this Court to remove the trial court's discretion, and substitute for it a burden-shifting analysis in which the court must award the modified amount retroactively if the obligor fails to meet an evidentiary burden clearly absent from the statutory language.[7] Section 156.401 states only that the court *may* modify an order if a material and substantial change in circumstances exists, and allows modification only for those obligations accruing after the date of service or an appearance in the suit. TEX. FAM. CODE ANN. §156.401 (Vernon 1996). Section 154.131, titled "Application of Guidelines to Retroactive Support," merely lists factors which the court must consider in determining whether to order retroactive support, if at all. TEX. FAM. CODE ANN. §154.131 (Vernon 1996). Nowhere in either statute do we find an affirmative evidentiary burden that the obligor must meet once the obligee has requested retroactive support. Nor are we able to locate, by reading the statutes together, language which would justify removing the trial court's discretion, and requiring it to automatically award the retroactive amount to the obligee upon the obligor's inability to meet such an evidentiary burden.

We hold that the court did not abuse its discretion in not awarding the modified amount of support retroac-

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[7] Because we find that the trial court did not abuse its discretion in refusing to award the retroactive modification, we do not decide whether section 154.131 is applicable in claims for retroactive modification, as opposed to a trial court's decision to make an *initial* retroactive award of child support against an obligor not subject to an existing support order.

tively. The trial court found that Cynthia's request for the retroactive modification was unsupported by the evidence. The court had before it two days of testimony and several binders of exhibits detailing the circumstances of the parties. However, the record reflects that only once was the *need* for a retroactive award discussed, and then only in a passing reference to the fact that Cynthia was indeed seeking a retroactive modification back to the date the motion to modify was filed. To justify such an award, the evidence must directly support a retroactive modification. *See Grundy v. Grundy*, 589 S.W.2d 776, 778 (Tex. Civ. App.-Dallas 1979, no writ).

We overrule Cynthia's second point of error.

CHILD SUPPORT JUDGMENT

In her fourth point of error, Cynthia claims that the trial court erred by not granting a child support judgment against Peter for medical expenses he was required to pay pursuant to the divorce decree, but has not. While the motion to modify was pending before the trial court, Cynthia filed a motion for contempt and clarification, in which she requested that Peter be held in contempt for failing to comply with the original order which required him to (1) maintain medical insurance for the child and (2) pay for a portion of all out-of-pocket medical expenses. In the alternative, she requested a child support money judgment in the amount of $5,312.69, representing premium payments and costs paid by Cynthia between January 1991 and January 1996. Peter introduced into evidence a letter, dated February 15, 1991, in which the parties agreed that Peter would cease carrying the child on his insurance policy, and would instead deposit into an account on a monthly basis sums to cover this cost. Cynthia would, from that point on, pay for the

child's insurance costs, and large medical expenses would be paid out of the account. If a substantial sum accumulated over a period of time, they agreed to allow the child to borrow from the principal, which would eventually be applied to her educational expenses after reaching 18. At trial, conflicting testimony was heard as to the manner in which Peter complied with his monthly obligations. Peter produced statements from three accounts, totaling $4,543.85, which he alleged represented the total amount of his accrued obligations pursuant to that agreement. In its judgment, the trial court denied Cynthia's motion for contempt, and found those sums to represent his court-ordered obligation to cover unreimbursed medical expenses and costs to maintain medical insurance on the child for the years 1991 through 1995. The trial court awarded the accounts to the child as her separate property, to be held in trust by Peter until the child attains majority.

Cynthia argues that, because the trial court did not award her a child support judgment as authorized by section 157.261 of the Family Code,[8] it effectively reduced the arrearage of a child support order as prohibited by section 157.262 of the Code.[9] We do not

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[8]Section 157.261-Unpaid Child Support as Judgment

A child support payment not timely made constitutes a final judgment for the amount due and owing, including interest as provided in this chapter.

TEX. FAM. CODE ANN. §157.261 (Vernon 1996).

[9]Section 157.262-Reduction of Arrearages

(a) In a contempt proceeding or in rendering a money judgment, the court may not reduce or modify the amount of child support arrearages.

[footnote continued]

reach her argument because we find she was estopped from bringing this point of error. At trial, Cynthia testified as follows:

Q. In reference to the monies that Mr. Nordstrom has in an account or appears in an account on Exhibit 18 and 19, are you asking that those can be paid in satisfaction into a trust if it's irrevocable, that he can not take it back himself?

A: Yes.

Q: In other words, it may remain in a trust in your daughter's name but you would need some control over it to make sure he can not withdraw it; is that correct?

A: Yes.

A party cannot encourage the court to take a particular action and then complain on appeal that the court erred by taking it. *Metzger v. Sebek*, 892 S.W.2d 20, 42 (Tex. App.-Houston [1st Dist.] 1994, writ denied).

We overrule Cynthia's fourth point of error.

ATTORNEY'S FEES

In her third point of error, Cynthia claims that the court erred by awarding Peter attorney's fees when she was the prevailing party on the motion to modify, and because awarding attorney's fees against the managing conservator could not be for the benefit of the child. The trial court awarded Peter $8,600 in attorney's fees. Cynthia had requested that she be awarded attorney's fees, but the court denied her request. Cynthia makes no com-

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(b) The money judgment for arrearages rendered by the court may be subject to a counterclaim or offset as provided by this subchapter.

TEX. FAM. CODE ANN. §157.262 (Vernon 1996).

plaint as to the presentation of, or the proof supporting, Peter's attorney's fees at trial. Reasonable attorney's fees may be taxed as costs in actions brought under the Family Code. TEX. FAM. CODE ANN. §106.002 (Vernon 1996). The award of attorney's fees in a suit affecting the parent-child relationship is within the sound discretion of the trial court. *Bruni v. Bruni*, 924 S.W.2d 366, 368 (Tex. 1996). Deciding which litigant is a "successful party" is often a difficult task in family law cases. *Billeaud v. Billeaud*, 697 S.W.2d 652, 655 (Tex. App.-Houston [1st Dist.] 1985, no writ). In some instances, attorney's fees may be awarded as costs even against the successful party if based on the best interest of the child. *Marichal v. Marichal*, 768 S.W.2d 383, 385 (Tex. App.-Houston [14th Dist.] 1989, writ denied).

We are unwilling to find that the trial court abused its discretion in awarding attorney's fees to Peter. In the proceedings below, Cynthia requested the trial court to (1) modify Peter's child support obligation from $1,000 per month to $3,615 per month; (2) retroactively apply that increase back to the date the motion was filed; (3) hold Peter in contempt for failing to pay for medical costs and insurance; (4) award a money judgment against Peter for the medical costs; and (5) award attorney's fees to her. The trial court denied her requests for a retroactive award, contempt, and for attorney's fees. The court did modify Peter's original support obligation, but only to the amount to which the parties had stipulated before trial. Also, although the court did award the dedicated accounts to the child, it did not award Cynthia the money judgment she had requested. Those accounts had been previously created and dedicated to the child's support, as found by the trial court. The court's order did require that those amounts be held in trust, but for all

intents and purposes, maintained the status quo. After comparing the relief requested by Cynthia with the relief actually granted by the court, we cannot say that the trial court abused its discretion in awarding attorney's fees to Peter.

We overrule Cynthia's third point of error.

CONCLUSION

We affirm the trial court's judgment.

/s/Tim Taft
Tim Taft
Justice

Chief Justice Schneider and Justice Andell also sitting.

Publish. TEX. R. APP. P. 47.

Judgment rendered and opinion delivered Nov -6 1997
True Copy Attest:
/s/ Margie Thompson
Clerk of Court

[SEAL] THE SUPREME COURT OF TEXAS
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July 16, 1998

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RE: Case Number 98-0252
Court of Appeals Number: 01-96-00956-CV
Trial Court Number: 87-01226

Style: CYNTHIA NORDSTROM
v.
PETER NORDSTROM

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Sincerely,

John T. Adams, Clerk

by /s/ Michael H. Kopp
Michael H. Kopp, Deputy

cc: Ms. Margie Thompson, Clerk
Mr. Charles Bacarisse

APPENDIX C

TEXAS FAMILY CODE
SECTION 14.053(l) (1993)

§ 14.053. Establishing Any Order of Child Support

(a) Order Based on Guidelines. An order of child support shall be based on the "net resources" of the obligor and obligee, which shall be considered by the court, together with the other factors listed in the guidelines for the support of a child in this chapter. Whenever feasible, gross income should first be computed on an annual basis and then should be recalculated to determine average monthly gross income.

(b) Net Resources Defined. "Net resources," for the purpose of determining child support liability, are 100 percent of all wage and salary income and other compensation for personal services (including commissions, overtime pay, tips, and bonuses), interest, dividends, royalty income (as described in Subsection (c) of this section), net rental income (defined as rent after deducting operating expenses and mortgage payments, but not including noncash items such as depreciation), and all other income actually being received, including but not limited to severance pay, retirement benefits, pensions, trust income, annuities, capital gains, social security benefits, unemployment benefits, disability and workers' compensation benefits, interest income from notes but not including return of principal or capital, [and/or] accounts receivable regardless of the source, gifts and prizes, spousal maintenance, and alimony, less (subtracting) 100 percent of social security taxes, federal income tax withholding for a single person claiming one personal exemption and the standard deduction, union dues, and

expenses for health insurance coverage for the obligor's child. Benefits paid pursuant to aid for families with dependent children and any other child support received from any source shall be disregarded in calculating net resources.

(c) Self-Employment Income. Income from self-employment, whether positive or negative, includes benefits allocated to an individual from a business or undertaking in the form of a proprietorship, partnership, joint venture, close corporation, agency, or independent contractor, less ordinary and necessary expenses required to produce that income, but may exclude amounts allowable under federal income tax law as depreciation, tax credits, or any other business expenses shown by the evidence to be inappropriate to the determination of income for the purpose of calculating child support.

(d) Health Insurance. The guidelines for a court order for the support of a child in this chapter assume that the court will order the obligor to provide health insurance coverage for the child subject of the suit in addition to the amount of child support calculated pursuant to these guidelines. If the court finds and sets forth in the order setting child support that the obligee will maintain health insurance coverage at the obligee's expense for the child, the court may increase the amount of child support to be paid by the obligor in an amount not exceeding the total expense to the obligee for maintaining health insurance coverage. ***As additional child support the court shall allocate between the parties, according to the parties' circumstances, the reasonable and necessary health care expenses of a child that are not reimbursed by health insurance.***

(e) Additional Factors. The court may consider any additional factors that increase or decrease the ability of

the obligor to make child support payments. When appropriate, in order to determine the "net resources" available for child support the court may assign a reasonable amount of "income" attributable to assets that do not currently produce income. However, the court shall consider whether certain nonincome-producing property can be liquidated without an unreasonable financial sacrifice because of cyclical or other market conditions. If there is not an effective market for the property, the carrying costs of such an investment, including property taxes and note payments, shall be offset against the income attributed to the property. The court may also assign a reasonable amount of "income" to income-producing assets that have been voluntarily transferred or reduced in earnings with the effect of reducing the net resources of the party. As used in this section, "property" and "assets" include both real and personal property and assets, including a business and investments.

(f) Intentional Unemployment or Underemployment. If the actual income of the obligor is significantly less than what the obligor could earn because the obligor is intentionally unemployed or underemployed, the court may apply these guidelines to the earning potention of the obligor.

(g) Furnish Information. The court shall require the parties to furnish sufficient information to enable it to accurately identify the parties' net resources and their abilities to provide child support. The court should request copies of the last two years' tax returns, accompanied by financial statements of the parties, and current wage stubs.

(h) Computing Net Monthly Income. To assist the courts in establishing the amount of a child support order, the agency charged with enforcing child support

orders under Part D of Title IV of the federal Social Security Act (42 U.S.C. Section 651 et seq.) shall annually promulgate tax charts to compute "net monthly income," subtracting from gross income social security taxes and federal income tax withholding for a single person claiming one personal exemption and the standard deduction.

(i) Equal Application. These guidelines shall be applied without regard to the sex of the obligor, obligee, or the child.

(j) Agreements. This section does not prohibit the parties from agreeing to an amount of child support that varies from the guidelines or prohibit the court from approving the agreement concerning support of the child as provided by Section 14.06 of this code.

(k) Wage or Salary Presumption. In the absence of sufficient evidence to determine the wages and salary income of the obligor or obligee it shall be presumed that the obligor or obligee has wages or salary equal to the prevailing federal minimum wage for a 40-hour week.

(l) [HB 1630] Retroactive Support. The guidelines for the support of a child in this chapter are intended to guide the court in determining the amount of retroactive child support that may be ordered under this chapter or Chapter 13 of this code. In ordering retroactive child support, the court shall consider the net resources of the obligor during the relevant time period.

(l) [HB 724] Retroactive Support. The guidelines for the support of a child in this chapter are intended to guide the court in determining the amount of retroactive child support, if any, to be ordered under this chapter or Chapter 13 of this code. In ordering retroactive child support, the court shall consider the net resources of the

obligor during the relevant time period. In making an order of retroactive support under this subsection, the court shall consider the following evidentiary factors:

(1) whether the mother of the child had made any previous attempts to notify the biological father of his paternity or probable paternity;

(2) whether the biological father had knowledge of his paternity or probable paternity;

(3) whether the order of retroactive child support will impose an undue financial hardship on the obligor or his family; and

(4) whether the obligor has provided actual support or other necessaries before the filing of the action.

History: Added by 71st Legis, Reg Sess 91989) ch 617 § 6, eff Sept 1, 1989. Amended (b) by 71st Legis, 1st C Sess (1989) ch 25 § 14, eff Nov 1, 1989. Added (k) by 72nd Legis, Reg Sess (1991) ch 459 § 2, eff Aug 26, 1991. Amended (b) by 72nd Legis, Reg Sess (1991) ch 825 § 1, eff Sept 1, 1991. **1993 amendment:** Added (1) by 73rd Legis, Reg Sess (1993) ch 730 § 12, eff Sept 1, 1993. Ch 730, eff Sept 1, 1993, provides that this "applies to a pending paternity proceeding without regard to whether the proceeding was commenced before, on, or after the effective date of those sections." Amended by 73rd Legis, Reg Sess (1993) ch 766 § 8, eff Sept 1, 1993. Ch 766, eff Sept 1, 1993, provides that this "applies to an original or modified order in a suit affecting the parent-child relationship under Title 2, Family Code, made on or after that date. The change made by this Act to Section 14.08(d), Family Code, applies only to a proceeding under that section in which a hearing has not been held before the effective date of this

Act. The enactment of the amendments made by this Act does not affect the validity or obligations, terms, and conditions of an order in a suit affecting the parent-child relationship made before the effective date of this Act, and this Act does not constitute a change of circumstances under Section 14.08, Family Code."

Comment

The basic structure of the supreme court's "advisory guidelines" issued Feb. 4, 1987 was left in place by the 1989 enactment of statutory guidelines. The most important change is that application of these guidelines is rebuttably presumed to be in the best interest of the child.

Subsection (b) makes it clear that "100 percent of all wage and salary income" includes overtime pay. Obviously, whether the pay is regular or overtime, the court must seek to even out irregularities in wages or salary by taking the long view of the obligor's ability to pay. For example, considering the past year of employment often will yield a more accurate profile than considering the last paycheck or two.

The 1993 amendment amends Subsection (d) to give express legal sanction to trial courts allocating unreimbursed medical expenses between the parents.

Subsection (k) provides a benchmark for calculating an appropriate child support order in the absence of reliable information about the obligor's financial circumstances, to wit, the federal minimum wage.

The 1993 addition of two Subsections (l) establishes a method for calculating retroactive support for a child

entitled to support under a Chapter 13 proceeding. See § 13.42.

Editor's Note: see comment and annotations to § 14.05, *supra.*

APPENDIX D

TEXAS FAMILY CODE
SECTION 14.062 (1993)

§14.062. *Retroactive Child Support* [~~Reimbursement for Public Assistance~~]

(a) ***In a suit affecting the parent-child relationship, a suit to establish paternity, or a suit under Chapter 21 of this code that is brought under Chapter 76, Human Resources Code, or Part D of Title IV of the federal Social Security Act (42 U.S.C. Section 651 et seq.), if the court finds that no decree or order affecting the parent-child relationship to which the parents were parties has been previously rendered, the court may order a parent to make periodic payments, a lump-sum payment, or both, as retroactive child support provided that the court shall be guided by the evidentiary factors contained in Section 14.053(1) of this code*** [~~The court may order either or both parents to make periodic payments or a lump sum payment as child support, or both, as reimbursement for public assistance paid by the state for the support of a child under Chapter 31, Human Resources Code~~].

(b) Unless the state is a party to an agreement concerning support or purporting to settle past, present, or future support obligations by prepayment or otherwise, an agreement between the parties does not reduce or terminate any right of this state or any other state to recover ***retroactive support*** [~~for public assistance provided~~].

(c) ***In a proceeding in which retroactive child support is sought under this section, the court shall use the child support guidelines provided by Section 14.053 of this code together with any relevant evidentiary factors.***

History: Added by 71st Legis, 1st C Sess (1989) ch 25 §15, eff Nov 1, 1989. 1993 amendment: Amended by 73rd Legis. Reg Sess (1993) ch 798 §8, eff Sept 1, 1993.

APPENDIX E

TEXAS FAMILY CODE
SECTION 106.002 (1995)

CHAPTER 106. COSTS AND ATTORNEY'S FEES

§ 106.002. Attorney's Fees

(a) In a suit under this subtitle, the court may order reasonable attorney's fees as costs and order the fees to be paid directly to an attorney.

(b) An award of attorney's fees may be enforced in the attorney's name by any means available for the enforcement of a judgment for debt.

Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995.

* * *

APPENDIX F

TEXAS FAMILY CODE
SECTION 154.009 (1995)

§ 154.009. Retroactive Child Support

(a) The court may order a parent to pay retroactive child support if the parent:

(1) has not previously been ordered to pay support for the child; and

(2) was not a party to a suit in which support was ordered.

(b) In ordering retroactive child support, the court shall apply the child support guidelines provided by this chapter.

(c) Unless the Title IV-D agency is a party to an agreement concerning support or purporting to settle past, present, or future support obligations by prepayment or otherwise, an agreement between the parties does not reduce or terminate retroactive support that the agency may request.

Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995.

* * *

APPENDIX G

TEXAS FAMILY CODE
SECTIONS 154.062, 154.065 THROUGH 154.068

§ 154.062. Net Resources

(a) The court shall calculate net resources for the purpose of determining child support liability as provided by this section.

(b) Resources include:

(1) 100 percent of all wage and salary income and other compensation for personal services (including commissions, overtime pay, tips, and bonuses);

(2) interest, dividends, and royalty income;

(3) self-employment income;

(4) net rental income (defined as rent after deducting operating expenses and mortgage payments, but not including noncash items such as depreciation); and

(5) all other income actually being received, including severance pay, retirement benefits, pensions, trust income, annuities, capital gains, social security benefits, unemployment benefits, disability and workers' compensation benefits, interest income from notes regardless of the source, gifts and prizes, spousal maintenance, and alimony.

(c) Resources do not include:

(1) return of principal or capital;

(2) accounts receivable; or

(3) benefits paid in accordance with aid for families with dependent children.

(d) The court shall deduct the following items from resources to determine the net resources available for child support:

(1) social security taxes;

(2) federal income tax based on the tax rate for a single person claiming one personal exemption and the standard deduction;

(3) state income tax;

(4) union dues; and

(5) expenses for health insurance coverage for the obligor's child.

Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995. Amended by Acts 1995, 74th Leg., ch. 751, § 41, eff. Sept. 1, 1995.

* * *

§ 154.065. Self-Employment Income

(a) Income from self-employment, whether positive or negative, includes benefits allocated to an individual from a business or undertaking in the form of a proprietorship, partnership, joint venture, close corporation, agency, or independent contractor, less ordinary and necessary expenses required to produce that income.

(b) In its discretion, the court may exclude from self-employment income amounts allowable under federal income tax law as depreciation, tax credits, or any other business expenses shown by the evidence to be inappropriate in making the determination of income available for the purpose of calculating child support.

Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995.

§ 154.066. Intentional Unemployment or Underemployment

If the actual income of the obligor is significantly less than what the obligor could earn because of intentional unemployment or underemployment, the court may apply the support guidelines to the earning potential of the obligor.

Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995.

§ 154.067. Deemed Income

(a) When appropriate, in order to determine the net resources available for child support, the court may assign a reasonable amount of deemed income attributable to assets that do not currently produce income. The court shall also consider whether certain property that is not producing income can be liquidated without an unreasonable financial sacrifice because of cyclical or other market conditions. If there is no effective market for the property, the carrying costs of such an investment, including property taxes and note payments, shall be offset against the income attributed to the property.

(b) The court may assign a reasonable amount of deemed income to income-producing assets that a party has voluntarily transferred or on which earnings have intentionally been reduced.

Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995.

§ 154.068. Wage and Salary Presumption

In the absence of evidence of the wage and salary income of a party, the court shall presume that the party

has wages or salary equal to the federal minimum wage for a 40-hour week.

Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995.

APPENDIX H

TEXAS FAMILY CODE
SECTIONS 154.121 THROUGH 154.131

SUBCHAPTER C. CHILD SUPPORT GUIDELINES

§ 154.121. Guidelines for the Support of a Child

The child support guidelines in this subchapter are intended to guide the court in determining an equitable amount of child support.

Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995.

§ 154.122. Application of Guidelines Rebuttably Presumed in Best Interest of Child

(a) The amount of a periodic child support payment established by the child support guidelines in effect in this state at the time of the hearing is presumed to be reasonable, and an order of support conforming to the guidelines is presumed to be in the best interest of the child.

(b) A court may determine that the application of the guidelines would be unjust or inappropriate under the circumstances.

Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995.

§ 154.123. Additional Factors for Court to Consider

(a) The court may order periodic child support payments in an amount other than that established by the guidelines if the evidence rebuts the presumption that application of the guidelines is in the best interest of the child and justifies a variance from the guidelines.

(b) In determining whether application of the guidelines would be unjust or inappropriate under the circumstances, the court shall consider evidence of all relevant factors, including:

(1) the age and needs of the child;

(2) the ability of the parents to contribute to the support of the child;

(3) any financial resources available for the support of the child;

(4) the amount of time of possession of and access to the child;

(5) the amount of the obligee's net resources, including the earning potential of the obligee if the actual income of the obligee is significantly less than what the obligee could earn because the obligee is intentionally unemployed or underemployed and including an increase or decrease in the income of the obligee or income that may be attributed to the property and assets of the obligee;

(6) child care expenses incurred by either party in order to maintain gainful employment;

(7) whether either party has the managing conservatorship or actual physical custody of another child;

(8) the amount of alimony or spousal maintenance actually and currently being paid or received by a party;

(9) the expenses for a son or daughter for education beyond secondary school;

(10) whether the obligor or obligee has an automobile, housing, or other benefits furnished by his or her employer, another person, or a business entity;

(11) the amount of other deductions from the wage or salary income and from other compensation for personal services of the parties;

(12) provision for health care insurance and payment of uninsured medical expenses;

(13) special or extraordinary educational, health care, or other expenses of the parties or of the child;

(14) the cost of travel in order to exercise possession of and access to a child;

(15) positive or negative cash flow from any real and personal property and assets, including a business and investments;

(16) debts or debt service assumed by either party; and

(17) any other reason consistent with the best interest of the child, taking into consideration the circumstances of the parents.

Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995.

§ 154.124. Agreement Concerning Support

(a) To promote the amicable settlement of disputes between the parties to a suit, the parties may enter into a written agreement containing provisions for support of the child and for modification of the agreement, including variations from the child suppost guidelines provided by Subchapter C.[1]

(b) If the court finds that the agreement is in the child's best interest, the court shall render an order in accordance with the agreement.

(c) Terms of the agreement in the order may be enforced by all remedies available for enforcement of

a judgment, including contempt, but are not enforceable as contract terms unless provided by the agreement.

(d) If the court finds the agreement is not in the child's best interest, the court may request the parties to submit a revised agreement or the court may render an order for the support of the child.

Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995.

[1]V.T.C.A., Family Code §154.121 et seq.

§ 154.125. Application of Guidelines to Net Resources of $6,000 or Less

(a) The guidelines for the support of a child in this section are specifically designed to apply to situations in which the obligor's monthly net resources are $6,000 or less.

(b) If the obligor's monthly net resources are $6,000 or less, the court shall presumptively apply the following schedule in rendering the child support order.

CHILD SUPPORT GUIDELINES

BASED ON THE MONTHLY NET RESOURCES OF THE OBLIGOR

1 child	20% of Obligor's Net Resources
2 children	25% of Obligor's Net Resources
3 children	30% of Obligor's Net Resources
4 children	35% of Obligor's Net Resources
5 children	40% of Obligor's Net Resources
6+ children	Not less than the amount for 5 children

Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995.

§ 154.126. Application of Guidelines to Net Resources of More Than $6,000 Monthly

(a) If the obligor's net resources exceed $6,000 per month, the court shall presumptively apply the percentage guidelines to the first $6,000 of the obligor's net resources. Without further reference to the percentage recommended by these guidelines, the court may order additional amounts of child support as appropriate, depending on the income of the parties and the proven needs of the child.

(b) The proper calculation of a child support order that exceeds the presumptive amount established for the first $6,000 of the obligor's net resources requires that the entire amount of the presumptive award be subtracted from the proven total needs of the child. After the presumptive award is subtracted, the court shall allocate between the parties the responsibility to meet the additional needs of the child according to the circumstances of the parties. However, in no event may the obligor be required to pay more child support than the greater of the presumptive amount or the amount equal to 100 percent of the proven needs of the child.

Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995.

§ 154.127. Partial Termination of Support Obligation

A child support order for more than one child shall provide that, on the termination of support for a child, the level of support for the remaining child or children is in accordance with the child support guidelines.

Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995.

§ 154.128. Computing Support for Children in More Than One Household

(a) In applying the child support guidelines for an obligor who has children in more than one household, the court shall apply the percentage guidelines in this subchapter by making the following computation:

(1) determine the amount of child support that would be ordered if all children whom the obligor has the legal duty to support lived in one household by applying the schedule in this subchapter;

(2) compute a child support credit for the obligor's children who are not before the court by dividing the amount determined under Subdivision (1) by the total number of children whom the obligor is obligated to support and multiplying that number by the number of the obligor's children who are not before the court;

(3) determine the adjusted net resources of the obligor by subtracting the child support credit computed under Subdivision (2) from the net resources of the obligor; and

(4) determine the child support amount for the children before the court by applying the percentage guidelines for one household for the number of children of the obligor before the court to the obligor's adjusted net resources.

(b) For the purpose of determining a child support credit, the total number of an obligor's children includes the children before the court for the establishment or modification of a support order and any other children, including children residing with the obligor, whom the obligor has the legal duty of support.

(c) The child support credit with respect to children for whom the obligor is obligated by an order to pay support is computed, regardless of whether the obligor is delinquent in child support payments, without regard to the amount of the order.

Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995.

§ 154.129. Alternative Method of Computing Support for Children in More Than One Household

In lieu of performing the computation under the preceding section, the court may determine the child support amount for the children before the court by applying the percentages in the table below to the obligor's net resources:

MULTIPLE FAMILY ADJUSTED GUIDELINES
(% OF NET RESOURCES)
Number of children before the court

		1	2	3	4	5	6	7
Number of	0	20.00	25.00	30.00	35.00	40.00	40.00	40.00
other	1	17.50	22.50	27.38	32.20	37.33	37.71	38.00
children for	2	16.00	20.63	25.20	30.33	35.43	36.00	36.44
whom the	3	14.75	19.00	24.00	29.00	34.00	34.67	35.20
obligor	4	13,60	18.33	23.14	28.00	32.89	33.60	34.18
has a	5	13.33	17.86	22.50	27.22	32.00	32.73	33.33
duty of	6	13.14	17.50	22.00	26060	31.27	32.00	32.62
duty of	6	13.14	17.50	22.00	26.60	31.27	32.00	32.62
support	7	13.00	17.22	21.60	26.09	30.67	31.38	32.00

Added by Acts 1995, 74th Leg., ch. 20, §1, eff. April 20, 1995.

§ 154.130. Findings in Child Support Order

(a) Without regard to Rules 296 through 299, Texas Rules of Civil Procedure, in rendering an order of child support, the court shall make the findings required by Subsection (b) if:

(1) a party files a written request with the court not later than 10 days after the date of the hearing;

(2) a party makes an oral request in open court during the hearing; or

(3) the amount of child support ordered by the court varies from the amount computed by applying the percentage guidelines.

(b) If findings are required by this section, the court shall state whether the application of the guidelines would be unjust or inappropriate and shall state the following in the child support order:

"(1) the monthly net resources of the obligor per month are $ _____ ;

"(2) the monthly net resources of the obligee per month are $ _____ ;

"(3) the percentage applied to the obligor's net resources for child support by the actual order rendered by the court is _____ %;

"(4) the amount of child support if the percentage guidelines are applied to the first $6,000 of the obligor's net resources is $ _____ ;

"(5) if applicable, the specific reasons that the amount of child support per month ordered by the court varies from the amount stated in Subdivision (4) are: _____; and

"(6) if applicable, the obligor is obligated to support children in more than one household, and:

"(A) the number of children before the court is ____;

"(B) the number of children not before the court residing in the same household with the obligor is ____ ; and

"(C) the number of children not before the court for whom the obligor is obligated by a court order to pay support, without regard to whether the obligor is delinquent in child support payments, and who are not counted under Paragraph (A) or (B) is ____ "

Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995.

§ 154.131. Application of Guidelines to Retroactive

(a) The child support guidelines are intended to guide the court in determining the amount of retroactive child support, if any, to be ordered.

(b) In ordering retroactive child support, the court shall consider the net resources of the obligor during the relevant time period and whether:

(1) the mother of the child had made any previous attempts to notify the biological father of his paternity or probable paternity;

(2) the biological father had knowledge of his paternity or probable paternity;

(3) the order of retroactive child support will impose an undue financial hardship on the obligor or the obligor's family; and

(4) the obligor has provided actual support or other necessaries before the filing of the action.

Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995.

[Sections 154.132 to 154.180 reserved for expansion]

APPENDIX I

TEXAS FAMILY CODE
SECTION 156.401

SUBCHAPTER E. MODIFICATION OF CHILD SUPPORT

§ 156.401. Grounds for Modification of Child Support

(a) Except as provided by Subsection (b), the court may modify an order that provides for the support of a child if the circumstances of the child or a person affected by the order have materially and substantially changed since the date of the order's rendition.

(b) A support order may be modified only as to obligations accruing after the earlier of:

(1) the date of service of citation; or

(2) an appearance in the suit to modify.

(c) An order of joint conservatorship, in and of itself, does not constitute grounds for modifying a support order.

Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995.

APPENDIX J

CHAPTER 42, UNITED STATES CODE §667

§667. State guidelines for child support awards

(a) Each State, as a condition for having its State plan approved under this part [42 USCS §§651 et seq.] must establish guidelines for child support award amounts within the State. The guidelines may be established by law or by judicial or administrative action, and shall be reviewed at least once every 4 years to ensure that their application results in the determination of appropriate child support award amounts.

(b)(1) The guidelines established pursuant to subsection (a) shall be made available to all judges and other officials who have the power to determine child support awards within such State.

(2) There shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded. A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case, as determined under criteria established by the State, shall be sufficient to rebut the presumption in that case.

(c) The Secretary shall furnish technical assistance to the States for establishing the guidelines, and each State shall furnish the Secretary with copies of its guidelines.

(Aug. 14, 1935, ch 531, Title IV, Part D, § 467, as added Aug. 16, 1984, P. L. 98-378, § 18(a), 98 Stat. 1321; Oct. 13, 1988, P. L. 100-485, Title I, Subtitle A, §103(a), (b), 102 Stat. 2346.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective date of section:

Act Aug. 16, 1984, P. L. 98-378, §18(b), 98 Stat. 1322, provides that this section "shall become effective on October 1, 1987.".

Amendments:

1988. Act Oct. 13, 1998 (effective one year after enactment, as provided by §103(f) of such Act, which appears as 42 USCS §666 note), in subsec. (a), inserted ", and shall be reviewed at least once every 4 years to ensure that their application results in the determination of appropriate child support award amounts"; and, in subsec. (b), designated the existing provisions as para. (1), in para. (1) as so designated, deleted ", but need not be binding upon such judges or other officials" following "State", and added para. (2).

APPENDIX K

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS OF MARCH 15, 1996 (STATEMENT OF FACTS)

[189]

Q Okay. Do you actually know how many miles in a year you spend going back and forth to town for Sarah's needs only, going to friend's houses, going on miscellaneous errands, driving to and from piano, going shopping, going to the movies and eating out –

A No.

Q – for Sarah's needs only?

A No.

Q Okay. I would suggest to you that if we just added up these numbers that we talked about for these majors events in her life that are re-occurring, that it would come to 2,016 just for these four numbers that we put in here earlier.

A Okay, that's a partial total.

[190]

Q Right. Even if we double this number, we're looking at less than 5,000 miles per year for Sarah, right?

A Yes.

Q Okay.

MS. BROUSSARD: Judge, is there anything on here that you want to copy down anything?

THE COURT: I have it all.

MS. BROUSSARD: Okay.

* * *

[191]

Q Tell me what 38 percent of 200 – $2,292 is.

A $870.96.

[192]

Q Can I just call it 871?

A Yes.

Q I'm going to read off some of the numbers from your Exhibit No. 14 and ask you to add them together for me, okay?

A All right.

Q So starting off with this 871, add in 725.

MS. DETAMORE: Judge, I have to object. That's a misstatement of the witness. 871 is not on her, is not on her exhibit. That's a figure that Ms. Broussard just, just provided by asking my client what's 38 percent of two other figures.

THE COURT: I think she said add on to the 875 from her exhibit; is that correct?

MS. BROUSSARD: Right, that's what I said.

Q (By Ms. Broussard) All right, the 275, the 150, and I'm going to put a star by that one because we're going to come back to that one, $50 for doctor and dentist, school expenses of 20, lunches of 120, hair cuts of 12, clothing of 200, entertainment of 100, allowance of 40, piano lessons of 60 and sports equipment of 30, can you tell me what that number is when you total it all up?

A I came up with 1,928.

APPENDIX L

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS OF MARCH 15, 1996 (STATEMENT OF FACTS)

[83]

A Yes.

Q And what does it cost you to insure Sarah on your insurance?

A An additional $65 a month.

Q Okay. If we take 65,526 times .2, that gives me – I'm sorry, that's not what we do. 65,526 divided by 12 equals – let me make sure – $5,460 per month times .2 would be 1,092. Now, let me hand you my calculator so you can check my numbers since I've already made one mistake during this trial. Would you check that addition and division and multiplication, please?

A All right, I'm starting with the addition. (Witness complies.) Okay.

Q Did you find any errors?

A No. It appears to be a correct calculation of the numbers.

Q Thank you. All right. So now you and I both know, don't we, from reviewing Mr. Nordstrom's production, that his net resources are clearly more than $6,000 per month?

A Yes.

Q Okay. And that if you apply the guidelines to that, he should pay at least $1,200 a month in child support for Sarah, correct?

[84]

A If you applied the guidelines –

Q Right, okay.

A – to the 6,000.

Q Correct. So if Mr. Nordstrom's minimum child support obligation was $1,200 a month and if you believe that applying the guidelines to your income would yield an obligation to you of $1,092 per month, then under those circumstances Sarah would have available to her $2,292 per month for her support; is that correct?

A You've applied two different standards to the number, Jennifer.

Q How have I applied two different standards?

A You've taken 20 percent of my net resources. You have not taken 20 percent of Peter's net resources.

Q All right. You're aware, Mrs. Nordstrom, that the way the guidelines read at the moment, that the Court applies 20 percent to the first 6,000 net, correct?

A That's correct.

Q And then the burden of proof shifts to you to prove that Sarah's needs are actually above that in order for you to be entitled to receive amounts above what the 20 percent will yield, correct?

A That's correct.

[85]

Q Okay. Sowhen I apply 20 percent to the next resource of 6,000, the correct calculation is $1,200, correct?

A Yes.

Q Okay. We haven't reached the issue of additional needs, have we?

A I believe I discussed those with my attorney.

Q No, no, no. I mean, in terms of these calculations, we haven't gotten there yet, correct?

A No, we have not.

Q Okay, so we're just talking application of the guidelines to amounts up to $6,000 per month, correct?

A Yes.

Q Okay. And that number without reference to any additional needs would be $2,292 a month for the support of this child?

A Yeah.

Q Okay. And that money is tax-free money, right? You look puzzled.

A Child support is not taxable as income; is that what you're getting at?

Q Because when we came to this number of $1,200 from Mr. Nordstrom, that was after we deducted the taxes from his gross earnings, correct?

[86]

A Yes, that's what you do.

Q Okay. And when we deducted yours, we did the same thing. We took the taxes out first and then we looked for child support, correct?

A That's correct.

Q Okay. So neither you nor Sarah pays any money, any taxes on this 2,292 that should be available for her support.

A Well, I've already paid the tax. All right, fine.

Q There are no additional taxes beyond what we've already shown on the board that we took out, correct?

A Well, as I mentioned to you, I have to pay County tax.

Q But that's not an income tax, is it?

A No, it is not.

Q Okay. Do you think that Mr. Nordstrom has to pay taxes on the property that he owns?

A Yes.

Q Does he – do you pay sales tax on top of your income taxes?

A Yes.

Q Do you think he pays sales taxes on top of his income taxes?

A Yes.

[87]

Q All right, so we're treating the parties equally at this point, right?

A No.

Q Why not?

A You've taken 20 percent of my total monthly net resources. You have not taken 20 percent of his total net resources.

Q But your net resources are $5,400 a month, correct?

A That's correct.

Q So you don't get to the $6,000 maximum, correct?

A No, I do not.

Q Okay. Mr. Nordstrom does, but we've said we haven't gotten to that part of him yet, correct?

A That is correct.

Q Okay. So to this point you and Mr. Nordstrom have been treated equally?

MS. DETAMORE: Judge, that's been asked and answered. She keeps saying it's not equal treatment because if you take 20 percent of her income, that is not fair if you're not taking 20 percent of his total income. It's been asked and answered, just repetitive. I think the Court understands that they're arguing apples and oranges at this point and it is argumentative.

[88]

MS. BROUSSARD: And, Your Honor, we're arguing apples and oranges because Mrs. Nordstrom doesn't want to answer the questions about apples and apples.

MS. DETAMORE: She has answered them all. She keeps stating there's not a fair treatment.

THE COURT: I believe, though, what the counselor is trying to get an understanding whether or not she understands the application of the guidelines that she wants to the application of the guideline. She had testified the application of the guideline to both incomes would be fair. And I think it's whether or not she understands the application of the guideline. And if she doesn't understand it, you know. . .

MS. BROUSSARD: Okay.

THE COURT: I think that's what you're getting at is whether or not she understands it.

MS. BROUSSARD: Basically, Judge. All right.

MS. DETAMORE: Judge, I think –

THE COURT: Let's go off the record for a second.

[89]

(Whereupon a brief moment was taken off the record.)

Q (By Ms. Broussard) Okay, so one more time, Ms. Nordstrom, from what we've done so far on the blackboard in understanding that there's more to do, would you agree that the guidelines have been

applied to – in the same manner to both parties at this point?

A They have been applied according to how the statute prescribes it.

Q Okay, thank you. That's good enough.

THE COURT: Why don't we break at this point?

MS. BROUSSARD: Oh, all right.

THE COURT: It's about 11:30 and I think we'll take a break at this time.

(Whereupon the lunch recess was taken at this time.)

* * *

APPENDIX M

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS OF MARCH 15, 1996 (STATEMENT OF FACTS)

[173]

Q Because Petitioner's 17 is about Mr. Nordstrom's salary when he lived overseas in the Hague; is that correct?

A Yes.

Q And Petitioner's 4-A reflects what he makes in 1996 living here in the United States.

A No, not correct.

Q Are you saying that Shell pays him more money than this?

A Yes, I am.

Q And how are they paying it to him?

A Petitioner's 4-A pay stub – hold it – will not show or should not show, if I am correct about this, the amounts that are taken out for his Provident Fund and his Shell Stock Investment Fund and SPDIF Fund and then are matched dollar for dollar and invested tax-free.

Q Well, if that's true, then can you tell me what this number is right here, that one right there?

A It says 11 percent Pay Deferral Investment Fund $575.21.

Q And the column over from that says what?

A Year-to-date $2,300.84.

[174]

Q And what would that indicate to you?

A That would indicate that in a very short period of time he's got another $2,300.84 in his income deferred funds.

Q Would it indicate to you at any level that that's the amount that was deducted from his paycheck to put into the Pay Deferral Fund?

A I'm not sure.

Q Do you still have that calculator up there?

A Yes.

Q Look at the line "Gross Pay" –

A Okay.

Q – the monthly amount 5,229.17, the first page there.

A Well, and it's variance with the pay stub in January which is the 7,000.

Q Ms. Nordstrom –

A All right.

Q – would you just look at the page?

A Yes.

Q What's the difference between the gross pay number and the taxable gross pay number?

A I'll check it again, $633.21

Q I'm sorry, what was the number, six what?

A $633.21.

APPENDIX N

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS OF MARCH 20, 1996 (CLOSING ARGUMENTS)

[332]

BY MS. DETAMORE:

MS. DETAMORE: I think that the Court has heard at agnosium about the exact expenses and how they came into being in regards to each of the categories that were presented on the board. And in that I would feel that the Court would see that the expenditures have been moderate but as to the child and to Mrs. Nordstrom, and that there was very little presented to the Court that would make the Court think that there are any luxuries that we were seeking out from Mrs. Nordstrom. But what we were looking at or trying to focus in on was the exact expenses of the child. And in such I would ask the Court to do a couple of things and that is on the groups of exhibits that the Court recognizes, that the checks and the credit card statements for the same period of time have to be combined in order to get a total for a year, that her expenses for the [333] child have been tested forwards, backwards, sideways, in every which way. And effectively it's born up to be exactly as she stated on her summary. And I don't think there has been any additional meet implied to that; that if you take both the Petitioner's exhibits and the Respondent's exhibits and using the same test criteria that Respondent's counsel asked us to use, put them together and each of them would be the same amount that Mrs. Nordstrom indicated she would pay. There are additional arguments that we made initially about retroactive that the Court should consider things such as how long it's been since

she's asked for any type of a modification, that she has been with the same amount of child support and that over time there's been a shifting of how much percentage of her income has actually been applied to supporting the child versus Mr. Nordstrom. In essence, she was being squeezed out on her personal expenditures in order to make enough room to buy what she needed for the child. We felt that the figure showed that eight percent of his income was being applied for many years to support the child versus her [334] percentage being three times that amount. Okay?

Additionally, we want the Court to consider that in a retroactive fashion what is appropriate to be paid in child support today would apply to the past from the date of the filing of this action. And it's supported by it.

We would want Mr. Nordstrom to be held accountable for the Order of this Court with reference to medical expenses. And I think that it was very clearly shown that there was 3,000, that he had an obligation that amounted to $3,900 and the payments should have been made on medical insurance, and half of the medical expenses that were supplied in discovery and in the contempt action and presented to the Court in the amount of $768.85. Mrs. Nordstrom said fine him in contempt; she has no desire to put him in jail. That wasn't the purpose, but to enforce that even if she made a proposal and agreement, that that money be given a credit if it was given to her or applied in an account for a college fund, it's appropriate that that be designated [335] for that and surrendered to her as part of this Court's enforcement of the Court's Order.

I think that this Court is not the only Court that has been struggling for a long time on what's the difference between needs versus absolute necessaries versus

lifestyle. We're not seeking lifestyle. And yet there is always a battle over which it needs, is it steak or is it beans? And I think given the information that the Court has been provided that what has been shown as needs is just that and what should be applied on the child support.

The Family Code has always addressed deferred income as one of those – as deferred taxes, that's still income and still something the Court is to consider as far as the full resources and the full net resources available to a parent for the support of the child. And it's obvious that there are amounts in addition to the W-2 that the Court would consider. And that doesn't matter. I think counsel used the expression someone with shift work over at Shell. It doesn't matter if it's someone with shift work over at Shell or one of the top executives, deferred tax income is still income [336] that the Court needs to examine as far as total resources.

As far as any rabbit trails – May I erase this, Judge? As far as any rabbit trails, I think that there was some question and I'm not for sure how it was supposed to be implied, but there was a statement that was missing in the discovery. But I don't think there's any question that all the checks were there. So I don't think that there's any question that it was fully presented and the ability to examine and cross-examine and investigate it.

Effectively, it is from the summary that we had up there on the board, I think it was demonstrated that of the present amount spent outside of, not including attorney's fees, this amount was a monthly on the child of an additional $700 that Mrs. Nordstrom would like to have available to her in order for her to invest in the child as far as vacations and culture and computer assistance and future expenses for the child. She testified that she has not expended an additional 700 a month. She doesn't

have it to expend at the present, but that's what she would anticipate. If that [337] figure was taken at a total, it would be $4,065. Mr. Nordstrom's Financial Information Statement what was presented on the board demonstrated in his Financial, that his expenses were under $5,400 just in broad categories on a monthly basis. I don't see how you can say there's something unreasonable about those expenses. I think that the Code and in particular – let me see if I can find the Code provision. I think Section 14.055c of the Family Code gives us an equation that needs to be followed as to how to figure between the two parties, the expenditures, their alterable fair share as such.

And we would present that the way that that would be demonstrated would be the child's expenses are $4,065. You say $4,000 alone. You subtract out a presumptive award which I think that the Code says that we're to do presumptively with his income on the threshold of the 20 percent of the first net 6,000 is $1,200. Then you end up with needs of $2,800.65. If you take Mr. Nordstrom's net resources, I think you're going to see that he makes about three to one what Ms. Nordstrom [338] makes. And if you're doing a fair share of it, that additional $2,800 on a three to one would demonstrate $2,100 as Mr. Nordstrom's fair share in addition to the presumptive award of 1,200; and Mrs. Nordstrom's fair share, an additional 700. Taking the 1,200 and the 2,100, I think that's what the Court has found as the amount of child support to be awarded from the evidence presented is $3,300 a month. And with that I would rest.

* * *

APPENDIX O

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS OF MARCH 20, 1996 (CLOSING ARGUMENTS)

[353]

On Cause Number 87-01226 Nordstrom, Cynthia Nordstrom vs. Peter John Nordstrom, the Court is making the following additional findings of fact and clarification. The Court's finding that Peter John Nordstrom's net monthly resources to be a total amount of $7,654.66. From his 1994 tax return, Movant's No. 1, the Court finds that he has additional investment income of $6,715 per year making it an additional 559.42 per month as additional income.

MS. BROUSSARD: And, Your Honor, that number, the 559 is included in the 7,654.-66 that you just found.

THE COURT: Okay.

MS. BROUSSARD: It is the salary, plus his investment income.

THE COURT: That's right, the 7,654.66 includes this additional investment income and his salary for a total net resources.

MS. DETAMORE: Judge, for the record, it's my understanding and I would object to the finding that the Court did not also include [354] deferred income that he has received or would be receiving in the future deposited by Shell into Deferred Income Retirement Accounts. So for the record, I object that the Court does not include any of those amounts in his net resources.

THE COURT: The Court fully acknowledges your objection and records it in the record and overrules your objection.

Going on, the Court also finds that concerning the amount of unpaid medical premiums, an agreement that the parties had entered into, the Court finds that the accounts that the money was put into the Berger, the Hinsdale and the Fidelity Account, Petitioner's 18, 19 and 20, that those accounts are to be held in trust for the benefit of the child and designated as child support as payment in lieu of those medical premiums.

The Court also finds that the attorney fees awarded in this cause shall bear interest at the legal maximum rate.

APPENDIX P

MONTHLY EXPENSE STATEMENTS

[Petitioner's Exhibit 14]

Necessary Monthly Living

Expenses

		Attributable to Support of Child
House payment	2000	1000
Home Equity Loan (50,000)	380	190
Home Maintenance	200	100
Food	550	275
Utilities/Phone	330	150
Doctor/Dentist/Drugs	100	50
Insurance - Medical	91	65
Automobile	126	63
Car payment (included in Home Equity Loan)		
Gas/Auto Maintenance/Parking Oil	300	150
School Expenses	20	20
Lunches/Supplies	320	120
Haircuts	25	12
Clothing	300	200
Cleaning	50	25
Legal Fees	250	250
Church	30	30

Entertainment for child	100	100
Allowance/spending	40	40
Travel	200	200
Piano lessons/tuning	60	60
Sports/Equipment	30	30
Savings Bonds	125	125
Tutoring	360	360
Total	5987	3615

[Petitioner's Exhibit 13]

NOTICE: This form is to be *completed* and a copy furnished to opposing Counsel and Court prior to the show cause hearing and/or hearing on the merits. All columns must be totaled.

FINANCIAL INFORMATION STATEMENT

CAUSE NO. 87-01226	245th District Court
Cynthia F. Nordstrom Petitioner	Peter John Nordstrom Respondent
Donna J. Detamore Attorney for Petitioner	Jennifer Broussard Attorney for Respondent

1. Date of Marriage 6-20-75
   Date of Divorce 10-18-89
2. Ages of children of this marriage: (13) ( ) ( ) ( )
3. Necessary Monthly Expenses:

House payment/rent	$2,000
Utilities including telephone	300
Food	550
Doctor/dentist/drugs	100
Insurance premiums	217
Car payments	300
Gasoline/oil/parking/bus fares	200
Car repairs/maintenance	100
Child care/school tuition	20
Lunches/school supplies	320
Haircuts	(+)25
Home maintenance	(+)200
SUBTOTAL	$4,032

SUBTOTAL FORWARD	$4,032
Clothing	300
Cleaning and laundry	50
Legal fees	250
Gifts	
Church support	30
Entertainment activities for children	100
Miscellaneous Allowance	40
Travel	(+)200
Piano lessons	(+)60
Sport	(+)30
Savings bonds	(+)125
Tutoring	(+)360
GRAND TOTAL	$5,987

Debts (other than house and car):

	AMOUNT	MONTHLY PAYMENT	
Mastercard	$4,500	$750	
VISA	3,800	80	
Home Equity Loan	50,000	380	
_____	(+) _____	(+)_____	
TOTAL		$1,210	(+)1,210

GRAND TOTAL (monthly expense and debts): $7,197

4. Are you working: X Yes ☐ No Kind of work: Utility Representation

Name of employer: Federal Energy Regulatory Commission

5. I am paid: ☐weekly X every two weeks ☐ twice a month ☐ once a month
I will get my next check on: 1-18-96
My annual rate is $85,422.40

6. Gross income (if available, attached last three pay stubs)

		EACH PAY PERIOD	MONTHLY
		$3,286.40	$_____
Deductions:			
Withholding tax	$411.16		
FICA	203.76		
Retirement	354.93		
Medical Insurance	62.89		
Savings Bonds and Loan	(+)107.50		
Savings allowments	(+)1,300.00		
TOTAL DEDUCTIONS:	$2,621.69	(-)2,621.69	(-) _____
NET INCOME:		$664.71	$3,880.94

7. Other income: X Yes ☐No Explain: $1,000 monthly child support

8. Have you received any overtime pay in the last 12 months? ☐Yes XNo

9. Quick assets: I have or subject to my control:

$ ___ cash
$ ____ credit unions
$ ____ stocks and bonds
$ ____ banks
$ ____ undeposited checks
$ ____ other
$ ____ savings and loan associations

I can borrow $ 33,000 on my signature.

10. Is your spouse working? X Yes ☐No Kind of work: _____
Name of spouse's employer: _____

11. My spouse is paid: ☐weekly X every two weeks ☐ twice a month ☐ once a month

My spouse will receive next check on: 10th and 25th of the month

12. Gross income (if available, attached spouse's last three pay stubs)

	EACH PAY PERIOD	MONTHLY
1994 - $140,000.00		
1995 - $154,880.00		$14,641.46
1996 - $176,099.00		
	$_____	
Deductions: 316.20		
Withholding tax $205.86		
FICA 3,843.21		
Retirement _____		
_____ _____		Family Code Chart
_____ (+) ____		
TOTAL DEDUCTIONS: $4,365.27	(-)_____	(-) 4,365.27
NET INCOME	$_____	$10,275.19

13. Other Income: ☐ Yes ☐ No. Explain: _____

14. Has your spouse received any overtime pay in the last 12 months? ☐ Yes ☐ No

15. Quick assets: My spouse has control of:
$ _____ cash
$ _____ credit unions
$ 50,000 stocks and bonds
$ _____ banks
$ _____ undeposited checks
$ _____ other
$ _____ savings and loan associations

My spouse can borrow $ _____ on signature.

16. Custody of the children is at present as follows: with mother, Cynthia Nordstrom

17. (ANSWER ONLY IF YOU ANTICIPATE RECEIVING SUPPORT) I feel the following sums are reasonable, necessary or within the ability of my spouse to pay, and it will be fair and equitable to require the following:

	EACH PAY PERIOD	MONTHLY
a. For temporary alimony	$____	$ -0-
b. For child support	+ ____	+ 3,615.00
18. Total lines 17a and 17b	$____	$3,615.00
19. Payee's Net Income	+____	+3,880.94
20. Total lines 18 and 19	$____	$7,495.00
21. Payor's Net Income	$____	$10,275.19
22. Less Alimony and Support (line 18)	(____)	(3,615.00)
23. Net Payor after deduction of child support and alimony	$____	$6,660.49
24. (ANSWER ONLY IF YOU ANTICIPATE PAYING SUPPORT) I feel that a reasonable sum for me to pay weekly or monthly would be:		
a. For temporary alimony	$____	$____
b. For child support	+____	+____
25 Total lines 24a and 24b	$____	$____

DATE: _____

_____

Signature of (Husband) / (Wife)

[Petitioner's Exhibit 29]

NO. 87-01226

IN THE DISTRICT COURT
245TH JUDICIAL DISTRICT
HARRIS COUNTY, TEXAS

IN THE MATTER OF
THE MARRIAGE OF:

CYNTHIA F. NORDSTROM
AND
PETER JOHN NORDSTROM

AND IN THE INTEREST OF:
SARAH ELIZABETH NORDSTROM,
A CHILD

FINANCIAL INFORMATION STATEMENT
PETER JOHN NORDSTROM

1. Date of Marriage _____

   Date of Divorce 10/18/89

2. Ages of Children: (13) ( ) ( ) ( ) ( ) ( ) ( )

3. Necessary Monthly Expenses:

House payment/rent-PIT est'd	$2,050
Utilities including telephone	450
Food	400
Doctor/Dentist/Drugs	50
Insurance premiums car	100
House insurance-flood/fire/	190
Gasoline/oil/parking/bus fare	100
Car repairs/maintenance	200

Haircuts	20
SUBTOTAL	$3,560
Balance Forward	3,560
Clothing	175
Cleaning/laundry	80
Legal fees	
Gifts	100
Church Support	-0-
Entertainment activity for children	200
Miscellaneous	
Yard care	150
+ Condo mtg., maint. & util.	700
GRAND TOTAL	4,965

Debts (other than house and car):

	Amount	Monthly Payment	
Loan - SPDIE:	$11,000	$400	
TOTAL	11,000	400	
GRAND TOTAL:	$_____	$_____	$5,565

4. Are you working: YES. OIL AND GAS EXPLORATION
   Name of employer: SHELL OIL (PECTIN INTERNATIONAL)
5. I am paid TWICE PER MONTH
   will get my next check 1/15/96
   My hourly rate is $_____

Gross Income (if available, attach last three pay stubs):

Deductions:	_ each pay period	Monthly	
	Monthly	$_____	$10,458*
Medicare	_____		
Withholding tax	_____		
FICA	_____		
Retirement	_____		
Health/dental/life Insurance (client)	_____		
TOTAL DEDUCTIONS:	_($_____)	($_____)	$3,137*)
NET MONTHLY INCOME:	$_____	$_____	$7,321*)

*PER 1995 TAX CHART

7. Other income: NO.

8. Have you received any overtime pay in the last 12 months? NO.

77

a CONTROL NUMBER	OMB NO. 1545-0008	
PEDERAL-W2 158432		

b EMPLOYER'S IDENTIFICATION NUMBER	1 WAGES, TIPS, OTHER COMPENSATION	2 FEDERAL INCOME TAX WITHHELD
76-0453301	238980.39	283.78
c EMPLOYER'S NAME, ADDRESS, AND ZIP CODE PECTEN SERVICES CO PO BOX 4282 HOUSTON TX 77210-4282	3 SOCIAL SECURITY WAGES 61200.00	4 SOCIAL SECURITY TAX WITHHELD 3794.40
	5 MEDICARE WAGES AND TIPS 247970.39	6 MEDICARE TAX WITHHELD 3595.55
	7 SOCIAL SECURITY TIPS	8 ALLOCATED TIPS
d EMPLOYEE'S SOCIAL SECURITY NUMBER 318-46-7101	9 ADVANCE EIC PAYMENT	10 DEPENDENT CARE BENEFITS
e EMPLOYEE'S NAME, ADDRESS, AND ZIP CODE PJ NORDSTROM ROOM 647 OSP P O BOX 4704 HOUSTON TX 77210	11 NONQUALIFIED PLANS .00	12 BENEFITS INCLUDED IN BOX 1 .00
	13 SEE INSTRUCTIONS FOR BOX 13 (D) 9240.00 (C) 641.19 (P) 4423.70	14 OTHER
	15 Statutory employee ☐ Deceased ☐ Pension Plan ☐ Legal rep ☐ 942 emp ☐ Deferred compensation ☒	

16 STATE EMPLOYER'S STATE I.D. NO.	17 STATE WAGES, TIPS, ETC.	18 STATE INCOME TAX	19 LOCALITY NAME	20 LOCAL WAGES, TIPS ETC.	21 LOCAL INCOME TAX

Dept. of the Treasury - Internal Revenue Service

Copy B To be filed with employee's FEDERAL tax return

Form W-2 Wage and Tax Statement 1985

This substitute Form W-2 Wage and Tax Statement is acceptable for filing with your Income Tax Return

BEST AVAILABLE

BLE COPY

A CONTROL NUMBER	OMB NO. 1545-0008	This information is being furnished to the Internal Revenue Service. If you are required to file a tax return, a negligence penalty or other sanction may be imposed on you if this income is taxable and you fail to report it.
FEDERAL-W2 158432		

B EMPLOYER'S IDENTIFICATION NUMBER	1 WAGES, TIPS, OTHER COMPENSATION	2 FEDERAL INCOME TAX WITHHELD
76-0453301	238980.39	283.78
C EMPLOYER'S NAME, ADDRESS, AND ZIP CODE	**3 SOCIAL SECURITY WAGES**	**4 SOCIAL SECURITY TAX WITHHELD**
PECTEN SERVICES CO PO BOX 4282 HOUSTON TX 77210-4282	61200.00	3794.40
	5 MEDICARE WAGES AND TIPS	**6 MEDICARE TAX WITHHELD**
	247970.39	3595.55
	7 SOCIAL SECURITY TIPS	**8 ALLOCATED TIPS**
D EMPLOYEE'S SOCIAL SECURITY NUMBER	**9 ADVANCE EIC PAYMENT**	**10 DEPENDENT CARE BENEFITS**
318-46-7101		
E EMPLOYEE'S NAME, ADDRESS, AND ZIP CODE	**11 NONQUALIFIED PLANS**	**12 BENEFITS INCLUDED IN BOX 1**
PJ NORDSTROM ROOM 647 OSP P O BOX 4704 HOUSTON TX 77210	.00	.00
	13 SEE INSTRUCTIONS FOR BOX 13 (D) 9240.00 (C) 641.19 (P) 4423.70	**14 OTHER**
	15 Statutory employee ☐ Deceased ☐ Pension Plan ☒ Legal rep ☐ 942 emp ☐ Deferred compensation ☒	

16 STATE EMPLOYER'S STATE I.D. NO.	17 STATE WAGES, TIPS, ETC.	18 STATE INCOME TAX	19 LOCALITY NAME	20 LOCAL WAGES, TIPS ETC.	21 LOCAL INCOME TAX

Copy C for EMPLOYEE'S RECORDS (See Notice on back.) Dept. of the Treasury - Internal Revenue Service

Form W-2 Wage and Tax Statement 1995

Supreme Court, U.S.
FILED
JAN 6 1999
OFFICE OF THE CLERK

No. 98-921

In The

Supreme Court of the United States

October Term, 1998

CYNTHIA F. NORDSTROM,

Petitioner,

v.

PETER J. NORDSTROM,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

BRIEF IN OPPOSITION

DAVID B. BLACK
[*Counsel of Record*]
MALCOLM D. DISHONGH
[Additional Counsel]
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713/529-5288
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Dated: January 5, 1999

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

ALTERNATE ISSUES PRESENTED

1. SHOULD THIS COURT REVIEW AN INDIVIDUAL'S CLAIMS (i) THAT TEXAS IS NOT COMPLYING WITH FEDERAL LEGISLATION WHICH CREATES NO FEDERAL RIGHTS, AND (ii) THAT A TEXAS COURT MISCONSTRUED TEXAS STATUTES?

2. SHOULD THIS COURT REVIEW A DISCRETIONARY AWARD OF ATTORNEY'S FEES MADE PURSUANT TO A TEXAS STATUTE?

RULE 29.4(a) LISTING

Since petitioner is an employee of the Federal Energy Regulatory Commission, the Solicitor General will be served with a copy of this response.

RULE 29.4(c) LISTING

Based solely on petitioner having served a copy of her petition on the Attorney General for the State of Texas, respondent is also serving a copy of this response on the Attorney General of the State of Texas.

TABLE OF CONTENTS

Page

ALTERNATE ISSUES PRESENTED i

RULE 29.4(a) LISTING..... ii

RULE 29.4(c) LISTING..... ii

TABLE OF CONTENTS..... iii

TABLE OF AUTHORITIES iv

I. OBJECTION TO JURISDICTION..... 1

II. OBJECTIONS TO MISSTATEMENTS OF FACT... 2

III. OBJECTIONS TO MISSTATEMENTS OF LAW ... 3

IV. NO FEDERAL ISSUE PRESENTED 3

V. FRIVOLOUS PETITION 5

VI. CONCLUSION 6

TABLE OF AUTHORITIES

Page

CASES

Adams v. Robertson, 520 U.S. 83 (1997) (per curiam) 1

Blessing v. Freestone, 520 U.S. 329 (1997) 4

Schad v. Arizona, 501 U.S. 624 (1991) 5

Scripto, Inc. v. Carson, 362 U.S. 207 (1960) 4

RULES

Sup. Ct. R. 14.1(g)(1) 1, 5

Sup. Ct. R. 42.2 6

Texas Rules of Appellate Procedure 133 3

SECONDARY AUTHORITY

Elaine A. Carlson & Roland Garcia, Jr.: *Discretionary Review Powers of the Texas Supreme Court*, 50 Tex. Bar J. 1201 (Dec. 1987) 3

I.

OBJECTION TO JURISDICTION

Respondent objects to consideration of the questions posed by petitioner because no federal issue was properly presented to or addressed by the Texas state courts. The petition should be denied because this Court lacks jurisdiction to consider the questions presented by petitioner.

Except under very rare exceptions, when the Supreme Court reviews a state court decision under 28 U.S.C. § 1257 it will not consider a federal claim unless it was either addressed by, or properly presented to, the state court. *Adams v. Robertson*, 520 U.S. 83 (1997) (per curiam). When the state court is silent on any federal question, the Supreme Court assumes that the issue was not properly presented to the state court; petitioner bears the burden of defeating that assumption. *Id.*

Petitioner first raised any claimed "federal question" in her amended motion for rehearing before the Texas supreme court, which is not sufficient when the state court is silent on the question. *Id.*, at footnote 3. Respondent's response to that amended motion for rehearing is attached as Respondent's Appendix 1.

Moreover, petitioner did not comply with this Court's Rule 14.1(g)(1). Petitioner failed to identify the stage of the proceedings in the state courts where the federal question was raised, the manner in which she raised it, and the way that the question was passed on by the state courts. Petitioner also failed to identify the portion of the record, or any summary thereof, where the federal matters appear, to show she timely raised any federal question.

II.

OBJECTION TO MISSTATEMENTS OF FACT

The tone of petitioner's brief is set by her appearance before this Court as Cynthia A. Frey (On the Brief) (Counsel of Record). While she may be also known as Cynthia A. Frey, at all times previous in these proceedings she has used the last name Nordstrom (through October 30, 1998; See Respondent's Appendix 2, responding to "Cynthia Frey Nordstrom"). The sudden switching of names in an obvious attempt to disguise the fact that counsel of record is also the petitioner characterizes her maneuvering throughout the appeals process by misstating facts in an attempt to mislead the court.

Petitioner's other misstatements are many and include, for example, her complaint that the trial court and court of appeals ignored a Texas statute in calculating respondent's net resources. Specifically, on page 20 of her petition, petitioner states "The trial court and the *Nordstrom* decision ignored the requirements of the statute to properly make this finding and include the appropriate items of income." That statement is false, because the calculation was directly addressed by the trial court, as quoted in petitioner's brief, and by the court of appeals under *Section C., Waiver,* in its opinion (Pet. App. 16a).

The gravamen of petitioner's complaints is the ability of the trial court, as the trier of fact, to judge the credibility of the witnesses and the weight to be given their testimony. Petitioner is not pleased with the credibility given her testimony by the trial court, but is not candid with this Court in her petition.

III.

OBJECTION TO MISSTATEMENTS OF LAW

Petitioner refers to the court of appeals opinion in *Nordstrom* throughout her petition as legal precedent, leading Texas jurisprudence down a slippery slope, culminating in "destructive consequences for thousands of women and children in Texas" (Petition, page 3). However, even though the Texas supreme court denied the petition for review (see Pet. App. 27a), they may not have been satisfied that the opinion of the court of appeals in all respects declared the law correctly, but may have been of the opinion that the application for writ presented "no error of law that required reversal", or presented no error of law "which is of such importance" to Texas jurisprudence as to require correction. Texas Rules of Appellate Procedure 133. Comparing it to this Court's denial of certiorari, commentators have pointed out that the denial of an application of writ to the Texas Supreme Court imports nothing to the merits of the case. Elaine A. Carlson & Roland Garcia, Jr.: *Discretionary Review Powers of the Texas Supreme Court*, 50 Tex. Bar J. 1201 (Dec. 1987).

IV.

NO FEDERAL ISSUE PRESENTED

No federal issue exists in this case for this Court to review. The constitutionality of the state statutes are not called into question by petitioner. Instead, petitioner argues that the court of appeals misinterpreted and misapplied the Texas Family Code.

Federal regulatory provisions relating to the enforcement of Title IV-D programs to the states, which petitioner cites as the federal issue (or interest), have been determined by this Court to simply set a "yardstick" by which the Secretary of Health and Human Services could measure the state's system-wide performance of the Title IV-D program. *Blessing v. Freestone*, 520 U.S. 329 (1997). The Secretary of Health and Human Services explained this to petitioner, before she filed her brief in this Court (Resp.App. 2) (Unlike the petitioners in *Blessing*, petitioner and her child are not entitled to Title IV-D assistance, and have not made any claims for that assistance).

Petitioner argues that the court of appeals has contravened federal intent of Title IV-D law, so this Court should intervene. However, she knows, or should know, she has no standing, and that this Court recognized in *Blessing* that Congress intended to leave the implementation of IV-D policy to the states, and simply established standards within the legislation for the Secretary of Health and Human Services to impose penalties against states that did not meet the standards which are set regarding compliance with those laws.

Although petitioner invites this Court to find the court of appeals misapplied certain sections of the Texas Family Code dealing with child support for those with income over $6,000 per month, and a discretionary award of attorney's fees, the rule established by this Court almost 40 years ago is clear. The application by a state court of state law to facts upon which it founds its judgment is controlling on this Court. *Scripto, Inc. v. Carson*, 362 U.S. 207, 210 (1960).

Petitioner would have this Court review the entire record below, determine what the facts are, interpret specific sections of the Texas Family Code, and remove the discretion of the trial court. When previously requested to engage in such activity, this Court declined, stating "we are not free to substitute our own interpretations of state statutes for those of a State's courts." *Schad v. Arizona*, 501 U.S. 624, 636 (1991).

V.

FRIVOLOUS PETITION

Petitioner's petition is frivolous. As an officer of the Court she knew, or should have known, she had not properly raised any federal question in the courts below, and that no federal issue was presented by her petition. A clear indication is her failure to comply with Rule 14.1(g)(1) of this Court, since had she done so, the defects in her petition would have been shown.

Also particularly telling is the letter petitioner received from the Department of Health and Human Services (Resp.App. 2), a month before her petition was filed. That letter clearly informs her:

> "The establishment of the guidelines to be used in determining or modifying a child support award amount is substantially a matter of State law. The application of these guidelines is determined by State rather than Federal law." (Resp.App. 2)

Respondent has incurred $3,000 in reasonable and necessary attorney's fees and costs in responding to the petition, which he requests be awarded him and against

petitioner as just damages, pursuant to Rule 42.2 of the Rules of the Supreme Court.

VI.

CONCLUSION

Petitioner failed to properly present what she argues are federal issues to the Texas state courts. She has not followed the Rules of this Court. In essence all her petition argues is that the court of appeals misconstrued or misapplied the Texas Family Code, which raises no federal issue for this Court to consider. Petitioner's slippery slope argument simply seeks to divert this Court's attention from the real credibility issues the trial court and the court of appeals found applicable to the evidence. Trial judges in Texas have the discretion to evaluate the credibility of the evidence; no abuse of that discretion was found by the court of appeals. Trial judges must have that discretion in evaluating the credibility of evidence offered to support claims that a child must have an additional $2,400 per month to pay for living expenses. In the courts below, and in her petition in this Court, petitioner has demonstrated that her credibility, and the credibility of her evidence, was properly scrutinized, and discounted, which does not raise a federal issue. Respondent requests that the Supreme Court deny the petition for

writ of certiorari, and award him just damages against petitioner.

Respectfully submitted,

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713/529-5528 (Fax)

RESPONDENT'S APPENDIX I

NO. 98-0252

THE SUPREME COURT OF TEXAS

CYNTHIA F. NORDSTROM,

Petitioner,

vs.

PETER JOHN NORDSTROM,

Respondent.

On Appeal From The First Court of Appeals
Houston, Texas
Cause No. 01-96-00956-CV

RESPONSE IN OPPOSITION TO MOTION TO FILE AMENDED MOTION FOR REHEARING AND TO MOTION FOR REHEARING

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

COMES NOW PETER JOHN NORDSTROM, respondent herein, and files this his response in opposition to petitioner's motion to file amended motion for rehearing ("motion"), and her motion for rehearing, and respectfully shows this Honorable Court that Petitioner's motion and motion for rehearing should be denied for the following reasons:

1. Petitioner's motion requests that she be allowed to amend her motion for rehearing pursuant to Rule 53.8 of the Texas Rules of Appellate Procedure. The rule allows the amendment of a petition, response, or reply (not a motion for rehearing), on such reasonable terms as the Court may prescribe.

2. The reason for amendment advanced by petitioner in her motion is that "she has found the federal laws governing the states regarding child support." This is not a proper or legitimate reason for amendment of her motion for rehearing because no issues of federal law were raised by petitioner in this case in the trial court, the court of appeals, or this Court before petitioner filed her motion for rehearing.

The function of a motion for rehearing is to present to the court errors of law which have been committed by court, in the opinion of the movant, together with such argument, authority, and statements from the record which may, in the opinion of movant, support the motion. *Dewey v. American Nat'l Bank*, 382 S.W.2d 524, 528 (Tex. App. – Amarillo 1964, writ ref'd n.r.e.) (on motion for reh'g), cert. denied, 382 U.S. 821, 86 S.Ct. 49, 15 L.Ed.2d 67 (1965).

For the first time in this case, including all appeals, petitioner alleges in her motion for rehearing that the opinion of the court of appeals is contrary to federal laws. Petitioner is a lawyer, who is employed by the federal government (opinion, page 2). She authored her own petition for review and reply to respondent's response to that petition in this Court. She knew, or should have known, if there were any federal law questions involved

in this case, and this appeal, long before she authored and filed her motion for rehearing. No federal law questions were previously raised in this case, including the appeals, because no legitimate federal law questions exist in this case.

3. Petitioner now asks this Court in her motion for rehearing to rehear matters that were never heard by the trial court, the court of appeals, or this Court, which is wrong. Matters must have first been heard, to later be reheard.

In her motion petitioner takes her new federal law issues to even another level, requesting to amend her motion for rehearing already containing improper new matters with more additional now "found" new matters.

4. Petitioner's motion for rehearing raises sham federal law issues, solely to attempt to create jurisdiction for her further appeal of this case. Petitioner's intent in this regard has been previously demonstrated before this Court, when she contended the attorney's fees award violated the open courts provision of the Texas Constitution, when the law clearly precluded that issue, in an attempt to bootstrap the jurisdiction of this Court (see respondent's response, page 5).

WHEREFORE, PREMISES CONSIDERED, respondent requests that petitioner's motion and motion for rehearing be denied.

Respectfully submitted,

/s/ _____

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Peter John Nordstrom

CERTIFICATE OF SERVICE

This is to certify that on the 5th day of August, 1998, a true and correct copy of the above and foregoing Response In Opposition To Motion To File Amended Motion For Rehearing And To Motion For Rehearing was sent by U.S. mail, certified return receipt requested, to Dianne Richards, 5599 San Felipe, Suite 903, Houston, Texas 77057.

/s/ _____

David B. Black

RESPONDENT'S APPENDIX 2

[LOGO] DEPARTMENT OF HEALTH & HUMAN SERVICES

OFFICE OF THE GENERAL COUNSEL
CHILDREN, FAMILIES AND AGING DIVISION

October 30, 1998

Mrs. Cynthia Frey Nordstrom
9100 Sterling Montague Drive
Great Falls, Virginia 22066

Dear Ms. Nordstrom:

Your recent correspondence to the Federal Office of Child Support Enforcement (OCSE) has been referred to our office for direct reply.

It is our understanding, based on the documents submitted, that you filed an action in the court of appeals for the First District of Texas appealing a decision from the 245th District court in Harris County, Texas in which you sought unsuccessfully to modify your child support order. The court of appeals affirmed the lower court's decision and the State Supreme Court denied your petition for review and motion for a rehearing. You then submitted documents dated October 2, 1998 to OCSE and the Department of Health and Human Services (HHS) "on appeal from a Texas state court decision" requesting various forms of relief from OCSE and HHS.

The establishment of the guidelines to be used in determining or modifying a child support award amount is substantially a matter of State law. The application of these guidelines is determined by State rather than Federal law. The guidelines Texas have enacted would

appear to be in accordance with the requirements in 45 C.F.R. 302.56.

The provisions establishing the Secretary's duties and authority under the Child Support and Establishment of Paternity Program are set out in section 452 of the Social Security Act. Most of these duties or responsibilities are delegated from the Secretary to the Deputy Director/ Commission of OCSE. The provisions in section 452 do not include any authorization for the Secretary to overrule decisions issued by a State court. Accordingly, neither the Department nor OCSE has the authority to grant the relief that you requested.

We are returning the documents which you submitted to the Office of Child Support Enforcement here in Washington, D.C. where they will be available for you to pick up. Further inquiries concerning this matter should be directed to Mr. James Travis in the OCSE Regional Office at the following address:

1200 Main Tower
Suite 1700
Dallas, Texas 75202
Phone (214) 767-6239

Mr. Travis may be able to explain to you further the requirements of the Federal law and regulations or respond to your questions concerning the Texas guidelines.

/s/ Robert E. Keith
Robert E. Keith
Associate General Counsel

cc: Judge David G. Ross
James Travis, Region VI

Supreme Court, U.S.
FILED
FEB 18 1999
CLERK

(4)

No. 98-921

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

CYNTHIA F. NORDSTROM,

Petitioner,

v.

PETER J. NORDSTROM,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF TEXAS

REPLY BRIEF FOR PETITIONER

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138P

PETITIONER'S RESUBMISSION OF QUESTION PRESENTED NUMBER TWO

II. WHETHER THE PETITIONER'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION HAVE BEEN VIOLATED BY: (1) WHETHER ASSESSING THE ATTORNEY'S FEES OF THE ABSENT FATHER AGAINST THE CUSTODIAL MOTHER REPRESENTS A REASONABLE STATE INTEREST, OR GOES SO FAR AS TO DENY THE PETITIONER'S RIGHTS TO THE BENEFIT OF THE LAWS ENACTED TO BENEFIT HER, AND DENIES HER ACCESS TO THE JUDICIAL SYSTEM; OR IS UNLAWFUL IN THAT IT EFFECTIVELY REDUCES CHILD SUPPORT; OR (2) WHETHER THE FEDERAL MANDATE OF 42 U.S.C. §667, WHICH REQUIRES THE STATE COURTS TO IMPLEMENT THE LAW IS UNENFORCEABLE, AND HAS RESULTED IN THE DENIAL OF HER OPPORTUNITY TO RECEIVE AN AWARD OF CHILD SUPPORT BASED ON FEDERAL AND STATE MANDATED CHILD SUPPORT GUIDELINES.

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*Due to a post office error, Petitioner was not aware that Respondent had filed his Brief In Opposition in this case until February 4, 1999, when she was called by his printer from Omaha, Nebraska. She obtained a copy of the reply from the Supreme Court Clerk's office the next day.

Page

TABLE OF CONTENTS

Resubmission of Question Presented Number Two i

Reply Brief For Petitioner 1

Argument:

Needs of the Child, Additional Needs and the Delaware Melson Theory 1

Income of Respondent 3

Federal and state mandated add-ons and "lifestyle" 4

Retroactive Child Support 5

Respondent has avoided the substantive issues 6

Petitioner's right to equal protection and due process 7

Federal law has been ignored by the Texas courts 9

Prayer 10

TABLE OF AUTHORITIES

Cases:

Boddie v. Connecticut, 401 U.S. 371 (1971) 7, 8

Ikard v. Ikard, 819 S.W.2d 644 (Tex. App. – El Pas, 1991, no writ) 5

M.L.B. v. S.L.J., 519 U.S. 102 (1996) 7

Nordstrom v. Nordstrom, 965 S.W.2d 575 (Tex. App. – Houston (1st Dist.) 1997, writ denied) . . . . . *passim*

Cases, continued: Page

Rodriguez v. Rodriguez, 860 S.W.2d 414 (Tex. 1993) 4, 5

Zajac v. Penkava, 924 S.W.2d 405 (Tex. App. – San Antonio, 1996, no writ) 5

Statutes, Rules and Other Authorities:

Tex. Fam. Code Section 106.002 (1995) 8, 9

Tex. Fam. Code Section 154.123 (1995) 4

Tex. Fam. Code Section 154.125 (1995) 2

Tex. Fam. Code Section 154.126 (1995) ..... *passim*

42 United States Code §667 (1994) ..... *passim*

Supreme Court Rule 42 9

REPLY BRIEF FOR PETITIONER

Respondent complains that Petitioner should have raised her constitutional claims at the state court level. Petitioner raised her claims there, but could not have anticipated the assault on the child support statutes in the state courts. Twenty-five percent of the children in this country live in poverty. Almost all of them are in homes headed by single mothers – and, contrary to unfair stereotypes, they are mostly white divorced or separated mothers. Congress' effort to address this terrible situation was to bolster and mandate better child support laws on a state by state basis. This approach is unenforceable.

Despite Respondent's claims that Petitioner is bound by state court findings, not one single state court judge has found the proven facts of the record in a statement as required by the Texas Family Code. Not one state court judge will address the issues in this case squarely. Not one state court judge will apply the law. The findings of the trial court and the decision by the First Court of Appeals in *Nordstrom* are state actions that deliberately violate and frustrate federal law and intent. These state actions are void under the constitutional laws of federal supremacy and federal supersession. Petitioner's right to equal protection and due process have also been violated by the assignment of attorney fees against her, and the unenforceability of 42 U.S.C. §667 (1994), as described below.

Needs of the Child, Additional Needs and the Delaware Melson Theory –

(1) Congress and Office of Child Support Enforcement (OCSE) regulations directed that child support should be based on the actual costs of raising a child.

(2) The OCSE provided several basic child support models to the states, including the Delaware Melson theory.

(3) Texas adopted a variation of the Delaware Melson theory for obligor incomes of over $6,000 a month in §154.126, of which this case is one. The higher income obligor is assigned a threshold amount from a chart for lower income obligors [here, $1200 which is 20% of a $6,000 monthly net income in §154.125]. The remaining needs of the child are allocated according to the "circumstances" of the parents. These circumstances are 3:1 in favor of Respondent.

(4) Petitioner, through extensive evidence, cross examination and testimony proved the needs of the child for the year of 1995, in a manner consistent with all reported recent cases in Texas.

(5) The trial court picked and chose the child's "needs", eliminating many whole categories of support. This produced an artificially reduced "need" figure.

(6) The magistrate and the trial court failed to make any actual finding of the financial needs of the child.

(7) The magistrate and trial court awarded only the statutory minimum from the chart, which represents less than 8 percent of Respondent's U.S. based income. This avoided the application of §154.126(b) which provides for additional needs of the child.

(8) The First Court of Appeals held that the trial court judge does not need to make any finding of the actual needs of the child, and does not need to give any explanation for this failure. This is in complete defiance of federal intent.

(9) The First Court of Appeals went even further in two respects. It declared §154.126(b) to be completely optional by the trial court judge. Along with the magistrate and the trial court, it also miscontrued the construc-

tion of the statute. The First Court of Appeals took 20% of the obligee/mother's net income, added the $1200 minimum for the obligor/father, and declared this sum to be more than sufficient to cover the "reduced need" figure produced by the pick and choose method of the trial court.

The real effect of this holding is to limit child support award for higher income obligors to a minimum mandatory figure found on a percentage chart for lower income obligors. If Respondent had a lower income, he would pay a mandatory 20%, not 8% as ordered in this case. The magistrate, trial court and the First Court of Appeals have assigned the additional needs of the child entirely to the mother. This is an allocation of two thirds of the needs of the child assessed to the custodial mother who has one-third of the income and resources of the absent father – a continuation of what she has paid for years.

Income of Respondent –

(1) Congress and OCSE regulations require that child support be calculated based on all of the income of the absent parent.

(2) Numerous Texas statutes track the OCSE Federal Handbook almost word for word, and require that all sources of income be used to calculate child support. Pet. for Writ, App. at 39a-42a, and Lodging A.

(3) There is solid proof in the record that Respondent's reported income was $238,980.39 in 1995. Pet. for Writ App. at 84a. Respondent's deferred and many other sources of income were also abundant in the record.

(4) The magistrate refused to find all of Respondent's income. Finding number 4 states: the percentage applied to the obligor's net resources for child support by the actual order rendered by the court is 20% of the first $6000 of the obligor's net monthly resources. Pet. for Writ, App. at 5a.

(5) In the trial *de novo,* the trial court used a figure derived from the net tax income shown in Respondent's 1994 income tax records, and specifically excluded Respondent's deferred income over the objection of Ms. Detamore. Pet. for Writ, App. at 65a.

(6) The First Court of Appeals avoided the issue (which was argued in Petitioner's brief) claiming that Petitioner had waived it.

Respondent argues that the state court has made a finding of Respondent's income which cannot be disturbed. The issue is whether the trial court followed the requirements of Congress, the federal government, and the Texas Family Code to include the appropriate items of income in its calculation of the obligor's income. As Congress properly understood and directed, child support cannot be fairly assessed unless all of the income of the absent parent is used in the calculation. The courts have deliberately evaded these federal and state requirements.

Federal and state mandated add-ons and "lifestyle" –

(1) The OCSE specifically included an extensive series of mandatory add-ons and deductions in its Federal Handbook for states to implement by statute.

(2) In Texas, they translated into §154.123 (other factors to consider).

(3) The Federal Handbook and the Delaware Melson theory specifically intend children to benefit from the income of their parents. Petitioner noted this in her Petition.

(4) In the 1993 revisions to the Texas Family Code, the legislature intentionally overruled *Rodriguez v. Rodriguez,* 860 S.W.2d 414 (Tex. 1993), which had specifically removed lifestyle considerations from the child support calculation. Despite Respondent's and the First Court

of Appeal's contentions, *Rodriguez* has been overruled twice by the 1993 and 1995 revisions to the Texas Family Code. *Zajac v. Penkava,* 924 S.W.2d 405 at 409, (Tex. App.-San Antonio, 1996, no writ), correctly held:

> The references to ability to pay and lifestyle which had been omitted in a prior recodification have now been superseded by the legislature in the 1993 amendments. The trial court is now affirmatively directed to consider the income and circumstances of the parties. We must assume the Legislature intended exactly what it said.

(5) In a footnote in *Nordstrom,* the First Court of Appeals has completely eliminated the mandatory add-ons and lifestyle considerations from the child support calculation, by stating that the language of §154.126(b) requiring the trial court to consider the "income of the parties" and "proven needs of the child" to address the additional needs of the child are the **only** "factors to be considered in awarding additional support." The utilization of the §154.123(b) factors is spotty in Texas. Petitioner has found two cases. *Ikard v. Ikard,* 819 S.W.2d 644 at 649 (Tex. App. – El Paso, 1991, no writ), stated, "That section requires the court to consider all relevant factors." *Zajac v. Penkava* also applied the factors where the total resources of the obligor exceeded $6,000. *Id.*

Retroactive Child Support –

(1) In OCSE action transmittals, OCSE-AT-93-04, Collection of Unreimbursed Assistance, and OCSE-AT-93-08, Use of Presumptive Child Support Guidelines process for Establishment of Support Awards/Collection of Unreimbursed Assistance, Lodging C, the OCSE authorized state IV-D programs to collect retroactive child support based on the guidelines back to the time of filing of the suit for modification.

(2) As Petitioner has shown in her Petition, Texas modified its laws to require mandatory retroactive child support back to the time of filing of a suit for modification to be consistent with that Federal intent. It is not limited to IV-D situations.

(3) The trial court denied retroactive child support.

(4) Contrary to statutes and a Texas Supreme Court case, the First Court of Appeals declared retroactive child support to be optional, and added an additional factor that is not in the statute, requiring Petitioner to show "need" for retroactive child support.

Respondent has avoided the substantive issues –

In his reply brief, Respondent begins with an approach that has been very successful for him in Texas courts: the attack on and denigration of the character of the mother, by objecting to her use of her maiden name for professional reasons.[1] Throughout the trial, Petitioner's credibility was never an issue, partly because she provided so much documentation, tabulation and proof of her expenses, and withstood vigorous cross-examination. Respondent is attempting to bootstrap his strategy into an issue. This is because he doesn't have the facts and he doesn't have the law. Neither did the First Court of Appeals.

Respondent has mischaracterized the facts by claiming that Petitioner lost the case. Petitioner actually pre-

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[1] It is immediately evident that Cynthia F. Nordstrom, Petitioner, and Cynthia A. Frey, counsel of record, are the same person. Petitioner has never hidden her identity. The only way Petitioner can afford to bring this case to this level is to write the brief herself. In a recently televised interview with Roger Mudd, Mr. Chief Justice Rehnquist described the operation of the Supreme Court, and explained why, "we do our own work." Petitioner feels that he would understand her present position as a little red hen. Petitioner has knocked on every door. She has received a great deal of empathy, but that's about all. Donna J. Detamore, who has practiced family law exclusively in the Texas state courts for

[footnote continued]

vailed. The trial court specifically found a change in circumstances necessary to justify a modification of child support. This is a threshold requirment for an increase, which Petitioner did receive, albeit a small amount.

Respondent claims that Petitioner has no standing, claiming that federal mandates are only applicable to Texas' child support guidelines as they apply to section IV-D (welfare) cases. Congress specifically intended that one set of child support guidelines apply to every child support case, whether IV-D or not. There is no question about this. Lodging B, p. 14 of 36.

Respondent claims that Petitioner would have the court review the entire record. This is not the case. Petitioner brings specific and detailed issues presented properly before the court, and is not requesting any general review of the record. Respondent also claims that this is a frivolous petition, arguing that these are state law issues, citing a letter from the Department of Health and Human Services. The letter highlights the critical need for this Court to hear this case, as discussed below.

Petitioner's right to equal protection and due process –

There is a distinct line of decisions from the United States Supreme Court that are applicable to family law cases. In *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), the Court

> recognized a narrow category of cases in which the State must provide access to its judicial processes, without regard to a party's ability to pay court fees. [citing *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971)] . . . the Court has consistently set apart

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twenty years, is lead counsel. Ms. Detamore, an accomplished and seasoned litigator, will be available to present oral argument, explain to this Court how child support modifications are actually handled, answer any questions, and describe the realities faced by single mothers and children in the courts of the State of Texas.

> from the mine run of civil cases those involving state controls or intrusions on family relationships. In that domain, to guard against undue official intrusion, the Court has examined closely and contextually the importance of the governmental interest advanced in defense of the intrusion. . . ." [citations omitted]

In *Boddie v. Connecticut,* the court found a $60 fee which prevented indigent appellants from obtaining a divorce to be a violation of their rights to due process. The "government interest" involved in this case concerns the court's use of fees and costs to allocate scarce judicial resources – balanced against the rights of Petitioner, the custodial mother. In this case the state court has gone too far. The assessment of attorney's fees against her was a punishment, a reduction in child support and an effort to discourage her appeal.

The assignment of attorney's fees of the absent father against the custodial mother is the most reprehensible part of this case. This holding flies in the face of all precedent and previous law in Texas. The chilling effect is of the greatest magnitude. The fear of being assessed an absent father's attorney's fees will keep thousands of single mothers out of the family courts.

In Texas, attorney's fees can be taxed as costs, § 106.-002. Attorney's fees are actually considered child support in Texas in enforcement proceedings and failure to pay them is punishable by a contempt action separate from a contempt action for failure to pay monthly child support. Although the trial court awarded a $200 a month increase, it reduced child support by assessing the absent father's attorney's fees against the custodial mother. In essence, the trial court has ordered child support payments by the custodial mother to be paid to the non-cus-

todial father. By upholding this award, the First Court of Appeals completely negates the purpose of the child support guidelines. Petitioner moves for an award for all of attorney's fees (taxed as costs) and costs of this case pursuant to Supreme Court Rules 42 and §106.002 of the Texas Family Code.

Federal law has been ignored by the Texas courts –

Petitioner's right to due process also involves a substantive expectation that she would receive the benefit of child support determined pursuant to the statutes in the 1995 Revisions to the Texas Family Code. Her expectation was not only due to the existence of those state statutes, but it was also premised on the requirement in 42 U.S.C. §667 (1994) that those child support guidelines were mandatory in state courts. The state courts have denied her the benefit of the laws written to financially assist her and her daughter. In fact, her efforts to avail herself of them has harmed her greatly. She is in a much worse position than when she started the process in 1994.

The letter from Health and Human Services is not controlling in this case, but it does illustrate the dichotomy between Congress' intent and reality. After passage of the Family Support Act of 1988, the Child Support Project was contracted out by the OCSE to the American Bar Association Family Law Division in Washington, D.C., to delineate federal intent, and assist the states in enacting child support laws consistent with federal methodologies, as shown in the Federal Handbook.

Congress made the new rules mandatory as to state courts in a 1989 amendment of 42 U.S.C. §667 (1994). Lodging B, p. 4 of 36. When the Child Support Project was complete, and the ABA lawyers left the OCSE, the OCSE dropped its tools. The federal strategy of mandating new rules for state court judges doesn't work. As the

Health and Human Services letter clearly illustrates, there is no remedy if state courts refuse to follow the guidelines. There is no remedy if a state court destroys an entire statutory scheme for child support.

The extraordinary costs to raise a child are well known and well published – but as §1-3 of Child Support Guidelines: interpretation and application, Aspen Law and Business, 1996, points out, most child support obligations are less than the absent father's monthly car payment. For Petitioner, a federal law which requires the cooperation of state court judges, but is entirely unenforceable, is a hollow promise.

PRAYER

The unconstitutional holdings in *Nordstrom* harm not only Petitioner and her daughter, but many other single mothers and their children in the State of Texas. Petitioner and her daughter have been denied the equal protection and due process of laws intended to benefit them.

Few single mothers have the persistence, knowledge or ability to raise a family law case to this level. Unpaid and underpaid child support runs into the tens of millions. Investment in the next generation is a national concern. It is important for the Court to decide a case where all of the major issues in child support are involved. Therefore, for the reasons stated above, and in Petitioner's Petition for Writ of Certiorari, Petitioner prays that this Court will grant her petition and hear this case.

Respectfully submitted,

DONNA J. DETAMORE
CYNTHIA A. FREY